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A VIEW OF
THE
HINDŪ LAW

AS ADMINISTERED BY THE

High Court of Judicature at Madras

BY

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“MĀYĀ DURATYAYĀ”

“ILLUSION IS HARD TO OVERCOME.”

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DEDICATED

(BY PERMISSION)

TO MY ESTEEMED FRIEND

A. C. BURNELL, ESQ., M. C. S.,

PHIL. DOCT., STRASSBURG,

WHOSE MANIFOLD ATTAINMENTS

AS A SANSKRITIST AND AN ORIENTALIST

HAVE MADE HIM

AN ORNAMENT TO A DISTINGUISHED SERVICE

AND EMINENT AMONG THE SCHOLARS OF EUROPE.

BUT FOR HIS FRUITFUL LABOURS IN THE FIELD OF HINDU LAW

AN ATTEMPT LIKE THIS

HAD BEEN WELL-NIGH IMPRACTICABLE.





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PREFACE.

SOME ten years ago, when engaged in preparing an account of the various tribes and castes of the Madura country for the "Madura Manual", and presiding over the Court of Small Causes in the Madura District, I was greatly astonished to find that the usages and customs of the natives of my District were altogether different from the usages and customs popularly supposed to be proper to Hindūs, and that were "*judicially recognized*" by the High Court of Judicature at Madras. My curiosity was aroused, and I resolved for the future to pay particular attention to such local usages and customs as might happen to come under my observation, in whatever part of the Madras Province I might be placed. Since then a tolerably long experience of disputes of all kinds between persons belonging to many Tamil-speaking castes and tribes has convinced me that the Tamils of the Madras Province, as a body, do not possess, and never have possessed, a body of positive laws; that though the greater number of them may have adopted in part the Brahmanical form of religious worship, they have not adopted in part the Sanskrit law that is a branch of the Hindū religion; and that so far from being Hindū in faith, thought and morals, the Tamils,



as a body, believe, think and act in modes entirely opposed to and incompatible with real, modern Hinduism. For polyandry, polygamy, various forms of incest, divorce, second marriages of widows and married women, the eating of flesh, the drinking of alcoholic drinks, devil-worship and other practices that unquestionably are widely prevalent amongst the Tamils, cannot now be indulged in by Hindus without instant loss of caste. And therefore it would seem to follow that the Tamils of Southern India, as a body, whatever religious faith individual Tamils may choose to profess, whether it be that of the Brahmans, or Buddhism, or Jainism, or Christianity, or belief in local devils, cannot be held to be Hindus, and as Hindus to be subject to the recognized Hindu law. And what I am persuaded is true of the Tamils in this respect, I believe to be true of the Telugus, Canarese and other peoples of the Madras Province also.

The High Court of Judicature at Madras nevertheless treats the non-Muhammedan inhabitants of the Madras Province generally as Hindus, and in many cases applies the very strictest Sanskrit law to persons belonging to rude tribes and castes whose morality and ways of life resemble those of the inhabitants of China as nearly as they resemble those of the ideal "mild Hindu". Sometimes indeed that Court is conscious, and humorously declares its consciousness, of the "*grotesque absurdity*" of its reasons for deciding questions that arise between such persons, as for example in the very important case reported at p. 310 of the VIth Volume of its Reports. And the partial recognition of the peculiar customs of the Western Coast is an accomplished fact of great significance and importance. But ordinarily the Madras High Court feels no hesitation in applying to the semi-barbarous races of the extreme South



of India law that it is no more "reasonable" to apply to them than, to use the Courts own words, "*It would be to give them the benefit of the Feudal Law of real property.*" To call attention to the absurdity and injustice of applying what is styled the "*Hindū law*" to the great bulk of the population of the Madras Province, is the main object of this little essay.

A portion of that population, however, say a thirtieth, perhaps a twentieth, part of it may reasonably be held to be liable to the application of the "*Hindū law*"? And that being so, the question arises: What is the "*Hindu law*"? and where is it to be found? In what language is it written? Looking to the little that at present is known of the history of India, I venture to think that no such thing as "*Hindū law*" has ever existed, and that its existence has been assumed upon no sufficient grounds by enthusiastic Sanskritists, who had neither time nor opportunity to acquaint themselves with the actual history and circumstances of the aggregate of countries called India. No doubt India has had her 'tribal customs' in the shape of *Dharma Sūtras* and *Smṛtis*, as Spain has had her books of customs, generally called 'Fueros': but the Digests were mere attempts to construct a scientific corpus juris out of rude and inharmonious materials. And there is no reason to suppose that the more or less powerful tax-gatherers who have held sway as Rajahs over various parts of India, have ever troubled themselves to interfere with the customs and rules of their tax-payers. Sir Henry Sumner Maine has shown this very clearly and forcibly in the XIIIth Lecture of his "*Early History of Institutions.*"

Conceding, however, for the moment that there has been and is such a thing as "*Hindū law*" in the proper sense of the term, that is to say in the sense of a body of



positive laws set to Hindūs and obliging them to a particular course of conduct, I believe it may with complete confidence be asserted that no English court of justice has yet discovered that body of laws, and that many years must elapse before the systematic researches of competent Orientalists shall have forced upon our courts an accurate conception of the meaning of the Sanskrit treatises on law that have come down to us. Something, however, has been done of late years in the way of making known what has been written about the law of the Hindūs, and the labours of Doctor Burnell in particular have been fruitful in practical suggestions. Relying chiefly on his invaluable aid, I have been tempted to attack some of the positions of the modern "*School of Hindu law*" established at Madras, and to attempt to show that whatever the "*Hindu law*" of the Sanskrit text-books may really be, it is a thing vastly different from the judge-made law reported in the Madras High Court Reports. Should I perchance succeed in winning some share of public attention for what I imagine to be a very important and terribly neglected subject, my purpose in making this essay will have been fully accomplished. I observe with great satisfaction that the Advocate-General of Madras has quite recently published a strong protest against the present administration of Hindu law in this Province, and trust that his efforts to do good may be at least partially successful. If practical lawyers begin to range themselves on the side of speculative writers upon Hindu law, a change for the better must soon be brought about.

J. H. NELSON.

CUDIPAH, March, 1877.



NOTANDUM.

As I have had occasion to quote many books, I have not altered the mode of writing Indian words used in each, but have left words as I found them. Hence an apparent irregularity of transcription in my essay. I trust it will cause no confusion, and will not be regarded as a serious fault.



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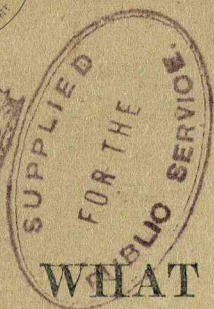
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CHAPTER I.



WHAT IS HINDU LAW?

By Section XVI of the Madras Regulation III of 1802 it was enacted that: "In suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the *Hindu laws* with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions. The Mahomedan and Hindu law officers of the Courts are to attend to expound *the law of their respective persuasions* in cases in which recourse may be required to be had to it." Then by Clause 2 of the same it was enacted that executors of wills of Hindoos and Mahomedans should proceed in the execution of their trust according to the will of the deceased and the "*laws and usages of the country*;" and by Clause 3 of the same it was enacted that in case of a Hindoo dying intestate, his heir "*who by the laws of the country may be entitled to succeed to the whole estate of the deceased*," may, if of age and not incompetent, "or his guardian or nearest of kin, who by special appointment, or by *the law and usages of the country*, may be authorized



to act for him," take possession of the estate without interference. And now the Madras Civil Courts' Act, 1873, directs, in Section 16, that:—"Where, in any suit or proceeding, it is necessary, for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, (a) the Muhammadan law in cases where the parties are Muhammadans, and the *Hindū law* in cases where the parties are Hindūs, or (b) any *custom* (if such there be) *having the force of law* and governing the parties or property concerned, shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished."

A question, therefore, of the very highest moment to the many millions of so-called '*Hindūs*' who inhabit the Madras Province, is: What is meant by the term "*Hindū Law*"?

Before attempting to seek for an answer to this question it is impossible to refrain from asking: Has such a thing as "*Hindū Law*" at any time existed in the world? Or is it that "*Hindū Law*" is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit? For myself, I have always been unable to bring myself to believe that the innumerable non-Muhammadan tribes and castes of India have at any time agreed to accept, or have been compelled to guide themselves by, an aggregate of positive laws or rules set to them by a sovereign or other person having power over them.



In other words: looking at 'law' from Austins point of view, I have always been unable to bring myself to believe that law has at any time been known to the so-called '*Hindū*' population of India.

In speaking here of law I desire to be understood to speak simply and strictly of an aggregate of laws proper, set to men by political superiors, and which are commands that oblige persons generally to acts or forbearances. Of other laws, whether set by God or by men who are not political superiors, I shall have no occasion to speak. Nor will it be necessary for me to consider the theory that a people gradually evolves for itself suitable laws out of its general consciousness.

That laws proper have at any time been set to the inhabitants of India generally by a sovereign or other political superior, it would, I am persuaded, be impossible to prove. Suppose for example that a man named Manu once lived and set laws to men, what little we know of the history of India shows clearly that he must have set laws not to the inhabitants of India generally, nor even to the inhabitants of the limited area over which the horde to which he belonged held a more or less effective sway, generally; but to a small number of Brahman and other *Ārya* families, and perhaps in a few instances to certain *Qūdras* who submitted themselves to and associated themselves with *Ārya* invaders of the Punjab. And Professor Max Müller tells us* that:—"The *Mānava*-

* Atep. 61, Ancient Sanskrit Literature, 2nd edn.



dharmā Śāstra, the law-book of the Mānavas, a subdivision of the sect of the Taittirīyas, or, as it is commonly called, the Laws of Manu, cannot be used as an independent authority. It cannot be said that the compilers of these laws were ignorant of the traditions of the Vedic age. Many of their verses contain a mere paraphrase of passages from the hymns, Brāhmaṇas, and Sūtras; but they likewise admitted the rules and customs of later ages, and their authority is therefore valid only where it has been checked by more original and valid texts."

If he at any time existed, therefore, which is most unlikely, Manu cannot be supposed to have set laws to India: and if Manu did not set laws to India, who else can be supposed to have done this? If I am rightly informed, there is not a trace of the existence in any part of India at any time of a set of positive laws such as the twelve tables of Rome, the Code of Draco, or the commandments of the Jews: but on the contrary we have the evidence of Megasthenes, and of Strabo (quoting Nearchus), to the fact that in old times there were no written laws in India, letters not being employed there for literary purposes. See Professor Max Müller, *Ancient Sanskrit Literature*, 2nd edn., 515.

Assuming, however, for arguments sake that a man named Manu once existed and set laws to men, —the probable date of those laws is as yet wholly unknown*, —it must, as I have already observed, be

* See Professor Max Müller, *Ancient Sanskrit Literature*, 2nd edn., p. 62.



conceded that he set them only to certain masses of men abiding in and about part of the Punjab, namely, to certain *Ārya* tribes or families and in some instances also to certain tribes or families styled *Çūdras*. Now: whether a remnant of any one of those tribes or families still exists in any part of India of course is exceedingly doubtful. And whether a remnant of any one of them existed at any time within the limits of the Madras Province, except perhaps on the Western Coast, is still more doubtful. But that a remnant of any one of them exists at the present day within those limits, except perhaps on the Western Coast, may I imagine, with tolerable confidence be denied. For nowadays it is generally admitted, I understand, that the *Kshatriyas* of this part of India (I except the Western Coast), if any there ever were, have utterly perished. See for example Professor Max Müller, *Ancient Sanskrit Literature*, 2nd edn., pp. 17 and 81. And no one, save perhaps a few pushing *Chettis* and Oilmongers, believes now that representatives of the *Vaisya* class survive in the South of India. And there is absolutely no proof that any one of the existing tribes and castes that constitute the great bulk of the non-*Ārya* population of the Madras Province was at any time made or styled '*Çūdra*' by *Ārya* conquerors: indeed, if I am not mistaken, there is no proof, not even a tradition, that an *Ārya* settlement was at any time effected in the southern part of the Indian Peninsula, whilst on the contrary there is excellent



reason to suppose that the bastard Hindūism of the Madras Province, such as it is, was introduced into it very slowly and laboriously by small parties of Brahmans and others, emigrant from the north.* The only real doubt, therefore, is about our Brahmans: Are the one million and odd Brahmans of the Madras Province, many of whom are as dark-skinned and puny as Pariahs, Brahmans pure and undefiled, true descendants of the white-faced warriors who first overran and in a sense civilized the North of India? I for one cannot believe that they are such.

If, however, with our present imperfect means of knowledge, it should be admitted for arguments sake that our Brahmans as a body are not manufactured Brahmans, but very Brahmans descended from ancestors who came from the Punjab, it need not also be admitted for arguments sake that their ancestors brought with them from the north, and during many long centuries maintained, intact all or most of the laws by which the early Brahmans may be supposed to have guided themselves when abiding in the Punjab, and that our Brahmans so maintain those laws even to this day. On the contrary it would seem to be highly improbable that the Brahmans of the Madras Province, assuming them to be very Brahmans, should have maintained intact to this day the laws set to their remote ancestors when abiding in the Punjab, inasmuch as their ancestors who came to the south must have come in small

* As to this, see Doctor Caldwell, *Grammar of the Dravidian Languages*, pp. 111-7, 2nd edn.



detached bodies, seeking subsistence in the most promising spots, and could hardly have had the power, if they had the will, to enforce amongst themselves strict obedience to their original laws. But that those earlier Brahmans had the will to do this can hardly be believed when we reflect that our Brahmans of to-day are segregated in numberless small clans, which for the most part are so alien one from another that an individual of one clan may not intermarry or even eat with an individual of another clan, and apparently are not bound together by any common interests, aspirations or pursuits. Looking to the present condition of our Brahmans, to the complete isolation of each of their clans, it seems to be very highly improbable that they should have agreed in preserving intact all or most of the laws, if any there were, by which their supposed earliest Indian progenitors guided themselves when resident in the Punjab. And since really no materials exist for ascertaining by what rules of law, if any, the *Ayyans*, *Ayyangārs* and other existing clans of our Brahmans severally guide themselves,* when not influenced by practitioners conversant with the ways of our courts of justice, I think it would be safe to go upon this antecedent improbability, and assume, until the contrary is proved, that our Brahmans have not preserved those laws intact. But this is not the only improbability to be taken into

* Doctor Burnell informs me that : They should follow the *Āpastamba*, *Gautama*, &c., *dharmaśāstras* according to the *śākhā* that they follow of their Veda, but they have many customs not recognized in the law-books.



consideration, for : “ It appears that at a very early period, the *Āryans* proper separated into a number of “ *kulas* ” or divisions, owing to the slight variations in the text of their sacred books, and also differences in their rites and customs, which a long course of oral tradition necessarily caused. Ill-feeling between the different *kulas* soon rose to an extravagant height, and these sets of works were composed to explain, define and justify the ritual and custom of each division.”* History repeats itself, and if the supposed earliest Indian progenitors of our Brahmans soon found themselves hopelessly estranged from one another by differences of this kind, it is indeed highly improbable that our Brahmans should now have anything like a common body of law.

Shortly, then : It must, I think, be conceded that the only possible descendants of *Āryans* proper, to be found now in the Madras Province (except perhaps on the Western Coast), are our Brahmans : and that it is highly improbable that our Brahmans have preserved intact to this day all or most of the laws, if any there were, by which the *Āryans* of the Punjab guided themselves.

If it be conceded that laws which may once have had force in the Punjab are not now maintained in the Madras Province by real representatives of the original *Ārya* settlers in the Punjab, it nevertheless

* See Doctor Burnell, *Dāya Vibhāga*, Introduction, vi.



may and probably will be urged that those laws, or at least laws nearly resembling those laws, certainly are now maintained in the Madras Province by certain tribes and castes, principally Brahman, who must have borrowed them from *Āryans*, and being so maintained constitute "*Hindū Law*." To this I would make answer by saying that:—So far as my experience goes, it would be very difficult to show that a single tribe or caste now resident in the Madras Province, whether Brahman or non-Brahman, in fact does maintain any such laws. If the matter were fairly and properly investigated, it would be found, I verily believe, that the various tribes and castes which constitute the population of the Madras Province in fact guide themselves, each in its own rude manner, by customs of which many are most widely and radically different from the rules supposed to have obtained in the Punjab, and indeed for the most part wholly inconsistent and incompatible therewith. Ages ago it was declared that the *Drāviḍas* had gradually sunk into the state of outcastes from the extinction of sacred rites and from having no communication with Brahmans.*

Vulgar errors are terribly long-lived, and probably the great majority of Englishmen still firmly believe that any native they may happen to meet, if not a Mahomedan or a Parsee, must needs be a '*Hindū*;' that existing '*Hindūs*' are duly ranged in four classes, namely:—(1) *Brahmans*, (2) *Kshatri-*

* See *Manu*, x, 43, 44.



yas, (3) *Vaisyas*, and (4) *Çūdras*; that Pariahs are outcastes and outcastes are Pariahs; that Brahmins generally are by profession and necessarily priests to the *Çūdras*; and other like absurdities too numerous to mention. No doubt much of this traditional ignorance will vanish in the course of a few years, and more rational ideas will hereafter prevail amongst Englishmen touching the origin, history, manners and customs of at least the more remarkable of the tribes and castes in the midst of whom we sojourn. In the meantime some good may possibly be wrought by calling attention to the existence of one of the most widely-spread and mischievous of vulgar errors respecting the natives of this country, that of imagining that the great bulk of the population is '*Hindū*,' and because '*Hindū*' therefore subject to a supposed aggregate of positive laws or rules to which has been given the name of "*Hindū law*."

I am not prepared to define here the name '*Hindū*' which is used in many very different senses, for example of '*Ārya*,' 'high-caste,' 'Indian,' &c., &c.,* but must content myself with making the observation that the name as at present commonly used seems to point primarily and mainly not to a nationality or locality but to the inheritance by birth of a peculiar religious faith and status. Thus in the South of India a child of Brahman parents

* Confer Dr. Caldwell, Grammar of the Dravidian Languages, App. 541-3, 2nd edn.



duly married is deemed a Hindū of Hindūs, whilst a son begotten by a non-Brahman on the body of a Brahman woman has no place in the Hindū world. And one born a Brahman but converted to Christianity, by his conversion abandons for ever his religious inheritance, and ceases to be Hindū, as also does one who is formally thrust out of his caste for his misdeed. But whilst it is very easy to lose the position and privileges of a Hindū, it is merely impossible for one not born a Hindū to acquire the same: no change of religion, no expenditure of money, no profession or promise can make a Hindū of one not born such.

There is not, and so far as appears never has been, a Hindū nation or people, in the proper sense of the term: and it would be idle to attempt to discover by research a body of positive laws based in the general consciousness of such a nation or people. But probably during many centuries there has existed in most parts of India a larger or smaller community of persons that might strictly and properly be styled '*Hindūs*.' The aggregate of these communities might strictly and properly be styled the "*Hindū community*" or "*fraternity*." And if it were to be ascertained that, after striking out unimportant local and tribal peculiarities of usage and custom, there remained an appreciable aggregate of ideas of law common to all or most of the constituent parts of that community or fraternity, that residuum might strictly and properly be called "*Hindū law*."



I think it improbable in a very high degree that a considerable residuum of the kind could be discovered: but whether I am right in so thinking, at present is immaterial. What passes in our courts for "*Hindū law*," is a thing that does not at all resemble or profess to resemble our conceivable residuum. It does not sufficiently take into account the patent fact that the usages, manners and customs manifested in different parts of India are very variant. It does not concern itself, or concerns itself very little, with the question, who are, who are not, '*Hindū*'? Ordinarily it does not attempt accurately to distinguish laws from customary observances, from sentiments, or from philosophic meditations. What then is the "*Hindū law*" of our courts? What its title to our respect?

A very brief survey of the so-called "*Hindū law*" cases reported in the Madras High Court Reports will suffice to satisfy the mind of an inquirer that:—

1. By '*Hindū*' is meant Sanskrit law.
2. Of the Chief Justices and Judges of the Madras High Court none has even partially understood the Sanskrit tongue.
3. Ordinarily, the basis of decision in a case of prime importance has been a more or less unsatisfactory and unintelligible translation of a text of doubtful authenticity and authority.
4. Translations of texts are interpreted and dealt with in a thoroughly unsympathetic spirit, by men



who appear to know nothing of, and care nothing for, the Hindū religion.

In effect: What is now administered as “*Hindū law*” to the various tribes and castes constituting the population of the Madras Province, most if not all of whom are not ‘*Hindū*,’ is an aggregate of discrepant and inconsistent guesses, made by unsympathetic persons wholly ignorant of Sanskrit, at the meaning of generally imperfect and sometimes questionable translations of mutilated Sanskrit texts, themselves of doubtful authenticity, taken at random from purely speculative and religious treatises on what ought to be the rules of conduct for an ideal *Ārya* community.

Doctor Burnell has pointed out in his *Note* to the recently published *Dāyadaṣaṣṭloki** that:—“There have been three periods in the study of Hindū Law by foreigners: *First*, that of enquiry, from the middle of the seventeenth century to 1820. The earlier works by Baldæus, Halhed and others are forgotten, and Sir W. Jones is only remembered by his having drawn attention to the subject. Colebrooke and his followers are the only ones who rendered real services to the science. The second period began when Colebrooke had left India, and lasted till recently. In it English lawyers, without any preparation for the task, attempted to systematise the materials they could find (whether good or bad, they did not seem to care;) these they interpreted

* Mangalore, Basel Mission Press, 1875.

by European notions, and introduced incongruous foreign ideas wherever they could. All that did not square with the preconceived notions of these "elegant" jurists was denounced as imposture and corrupt forgery, and this period is marked by a vigorous but entirely unfounded denunciation of the Pandits. The third and last period has only commenced quite lately, and was promoted by the late Professor Goldstücker. It is marked by critical new editions of the old standard translations by Colebrooke and others, and by critical editions of texts and an enquiry into the sources and growth of Hindū Law. The progress of this new school is slow but sure, and for the sake of the people of the country, it is to be earnestly desired that the false science of what I have termed the 'second period' may soon become a matter of history."

It cannot be doubted that the second of these periods has produced entirely erroneous views regarding the nature of the so-called "*Hindū Law*," and that it remains for the third of them to produce hereafter in the course of time, probably not until after the lapse of many decades, a true and scientific exposition of the nature and principles of that law. That done, the Government of India will doubtless take into consideration the advisability of attempting to compile a Code of Hindū law, and possibly our successors may see India happy in the possession of a compendious and intelligible set of laws regulating for Hindūs according to Hindū



principles the devolution of property and other important matters.

But until that auspicious time shall have arrived, those who are charged with the grave responsibility of administering civil justice to the natives of India cannot afford to sit idle. They dare not fold their hands and say: "The present system works well enough. Nobody complains about it. On the whole no doubt substantial justice is done." The fact is, and I am confident that few Madras judges of experience will venture to gainsay it, the present system of administering "*Hindū Law*" to the so-called '*Hindūs*' of the Madras Province works very ill indeed. Natives of all classes are dissatisfied with it. Substantial justice is *not* done. But on the contrary the decrees passed by our courts of justice in suits involving questions of "*Hindū law*" are for the most part grossly unjust. And the result is, that houses are divided against themselves, respectable families are brought to beggary, doubt and uncertainty prevail everywhere, and the value of property is rapidly falling.

I shall attempt presently to make these words good. In the mean time I shall explain briefly the objects of this little treatise. They are :—

1. To show that many of the leading principles upon which the Madras High Court has proceeded in laying down rules of "*Hindū law*" about inheritance, succession and certain kindred subjects are false principles.



2. To set forth a few rules of "*Hindū law*" about inheritance, succession and certain kindred subjects that really are contained in Sanskrit works of authority.

3. To show that '*Hindū*' or Sanskrit law is not applicable, certainly not universally applicable, to the tribes and castes constituting the so-called '*Hindū*' population of the Madras Province: but those tribes and castes have usages, manners and customs of their own antagonistic to and exclusive of the *Hindū* or Sanskrit law.

The Sanskrit law is part of the religious system of the Brahmans, just as Jews and Muhammadans have laws of inheritance, &c., as part of their religions.





CHAPTER II.

EIDOLA OF ANGLO-SANS-
KRIT NOMOLOGY.

IN the 2nd Section of his Preface to his translation of *Varadarājas Vyavahāranirṇaya* Doctor Burnell, after observing that the commentators and authors of the Digests do not give exact and authoritative explanations of the older texts, but only guess at their meaning, with limited success, comes to the following highly important conclusion :—"A knowledge of the principles of Sanskrit law is alone valuable, and cases must be decided by these principles. Attention paid to subordinate details must yield unsatisfactory results and cause the greatest confusion. It must never be forgotten that the treatises consulted by the Courts are not Codes or Institutes, they are attempts to elicit a body of doctrine from inconsistent text-books in many cases grievously misunderstood; they may help, but are not conclusive."

To conscientious judges who always do their best, but for the most part in vain, to put a satisfactory meaning upon enigmatic propositions contained in English translations of treatises upon



"*Hindū law*," it must be comforting indeed to learn that for the future they need not trouble themselves about subordinate details, but must be content to decide cases in accordance with the principles of Sanskrit law. Such principles, when discovered and settled, probably will never be very numerous or of a very complex character. The principles of "*Hindū law*" at present authorized and in fashion in the Madras Province are very few in number, and I purpose in this chapter to attempt to show that at least some of them are false.

Before making the attempt I must declare at once and explicitly that I have no intention or desire to call in question for a moment the industry, learning or ability of the Judges of the Madras High Court. If those eminent men have gone astray in endeavouring to systematize scanty and untrustworthy materials, no doubt they have done so not through any fault of their own but unavoidably, from the very necessity of the case. My sole object in taking exception to anything that the Madras High Court may have done, is to invite attention to recent discoveries of others, and if possible stop to some extent the perpetuation of gross and palpable error.

The false principles of "*Hindū law*" with which I purpose dealing are the following, namely:—

I. That there exist, or formerly existed, in India certain "*Schools of Hindū law*": and that such



schools have authority in certain imaginary parts of India such as the *Karṇāṭaka* Kingdom, the *Āndhrā* country, the *Drāviḍa* country, &c., &c.

II. That the so-called "*Hindū law*" is applicable to all persons vulgarly styled '*Hindūs*,' and to their decendants however remote and whether pure or not pure.

III. That a custom which has never been "*judicially recognized*" cannot be permitted to prevail against distinct authority.

IV. That a state of union is the normal and proper state of a Hindū family, and therefore non-division should in all cases be presumed until the contrary be proved.

V. That as to ancestral property a son, and therefore a grandson, may compel a division against the will of his father or grandfather.

VI. That a member of an undivided family can aliene joint ancestral property to the extent of his own share.

VII. That "*self-acquired property*" ordinarily is indivisible.

VIII. That debts incurred by the managing member of a Hindū family should be presumed, in favor of a minor, not to have been incurred for the benefit of the family.

IX. That the widow of an undivided coparcener, whether childless or not, has no title to anything but maintenance.

X. That ancient *Zamīndāris* are not divisible because they are “*of the nature of principalities.*”

XI. That one, with whose mother the adopter could not legally have married, must not be adopted.

XII. That the *Āliyasantānada Kattu Kattale* is a work of authority on the law of South *Kannāḍa*.

XIII. That ‘*Survivorship*’ is a principle upon which the rule of succession in part depends.

XIV. That a widow can adopt a son without the consent of her husband.

XV. That a Hindū family may be at one and the same time divided and undivided.

Now with regard to the 1st false principle:—
 “That there exist, or formerly existed, in India certain “*Schools of Hindū law,*” and that such schools have authority in certain imaginary parts of India such as the *Karṇāṭaka* Kingdom, the *Āndhra* country, the *Drāviḍa* country, &c., &c.,”—it is to be observed that the extraordinary doctrine of “*Schools of Hindū law*” seems to have been invented by English lawyers in very early times, unhesitatingly accepted by Sir Thomas Strange, and received from him without question, and judicially recognized, by the Madras High Court. Thus at I. M. H. C. R., 85, is reported the case of *Doe d. Kullammāl v. Kuppu Pillei*, and in the judgment will be found statements of what the “*Bengal School*” and the “*Benares School*” are supposed to

have laid down about alienation by a widow, of immovables. And in *Palanivelappa Kaundan v. Mannāru Naikan and another*, II. M. H. C. R., 416, we hear of the doctrine and theory of the “*Madras School*”; whilst in *Narasammāl v. Balaramāchārlu*, I. M. H. C. R., 420, an important distinction is drawn between the *Drāviḍa* and *Āndhra* countries. Now what is the authority for assuming the existence of “*Schools of Hindū law*?” Apparently there is none of the slightest value.

Doctor Burnell says of this doctrine* “This is unnecessary and foreign to the original texts and Digests. It is unnecessary because the real differences between even the *Mitākṣarā* and *Dāyabhāga* are very few in number, certainly not more than the constructions one often finds put upon some English law, and it is quite beyond doubt that the authors of the texts and Digests had no notion of the kind. Nor does it represent any historical fact.” Now if it be true that the authors of the Digests “had no notion of the kind,” then, seeing that the Digests certainly were compiled in comparatively modern times, most of them after the greater part of the Telugu country had become subject to Muhammadan invaders, it is difficult to understand when and how “*Schools of Hindū Law*” sprang up. When the whole of the South of India was being incessantly convulsed with invasions,

* *Varadarājas Vyavahāranirṇaya*, Preface, v.



wars and social upheavals of all kinds, what opportunity could there have been for schools of law to form themselves? And who could have had sufficient authority to establish them? If "*Hindū Law*" ever existed, which is very difficult to believe, it is almost impossible, it seems to me, to believe that "*Schools of Hindū Law*" have been established and have flourished.

There appears to have been a considerable amount of literary activity in the Vijayanagara Empire during the latter half of the fourteenth century, when Mādhava (Sāyana) wrote his celebrated commentary, and possibly the then contemplated revival of Hindūism included an attempt to raise up Sanskrit Law to use and dignity. But the attempt must have been to renew and restore what was old and possibly effete: not to found a new "*School of law*" inconsistent with and opposed to existing schools. Whatever the attempt may have been, there can be no doubt, I think, that it failed utterly. For servants of the Vijayanagara Lord marched southwards and gradually took possession of the Tanjore and Madura countries in the fourteenth and fifteenth centuries and established in them dynasties that lasted and even flourished for considerable spaces of time, and we have rather copious accounts of the doings of these dynasties, furnished by the Jesuit Missionaries, who worked in the South of India during the seventeenth and eighteenth centuries and reported to head-quarters from time to time, often year by year, the results of their



labours. And judging from the reports of these men, some of whom, notably Robert de Nobilibus and Beschi, were most conspicuous both for learning and ability, I take it to be certain that during the palmiest days of the *Nāyakkans* rulers of Tanjore and Madura law, lawyers and law-courts were wholly unknown in the South of India, and when obstinate disputes raged between subjects, they invariably were settled, if at all, not by decrees of courts, but by the partial, high-handed interference of some powerful man, either the headman of a village, or the governor of a district, or a noble attached to the court, or occasionally the king himself.

Besides the *Nāyakkans* of Tanjore and Madura there was the *Nāyakkans* of Gingi. I do not know when and in what circumstances the Princes of that name first established their power, but think it probable that one of them formed a kingdom for himself a little later than the *Nāyakkans* of Tanjore and Madura formed theirs. However this may have been, it seems to me impossible that the state of the Kingdom of Gingi could at any time during the seventeenth and eighteenth centuries have been such as to admit of the existence of law-courts and the administration of justice to protected subjects. The country was harassed by constant wars, and by constant changes of rule. The following extract from a letter of the Jesuit Father P. André Freire, of the year 1682, to be found in the "*Mission du Maduré*,"* shows what was the state of things at that time.

* Par Le P. J. Bertrand, Paris, 1850. Vol. III., p. 307.

He writes :—"Impossible d'énumérer les exactions, les brigandages, les meurtres qui désolent ce pauvre royaume. De nouvelles calamités et de nouveaux changements politiques sont annoncés : on dit que le Mogol, à la sollicitation du Maïssour, envoie une armée formidable contre Sambogi. En attendant, celui-ci poursuit ses conquêtes contre le Maïssour non seulement dans le royaume de Maduré, mais encore dans les provinces du nord, où il lui a enlevé plusieurs forteresses, toute la province de Darmabouri et d'autres terres voisines. Il paraît qu'il est secondé par l'Iquérian, ou roi du Canara, et par le roi de Goleconde, qui se sont tous les deux unis contre le Maïssour, regardé comme l'ennemi commun. Je crains bien qu'une triste expérience ne leur apprenne ce que l'exemple de nos trois Nayakers aurait dû leur faire comprendre : que leurs véritables ennemis sont Ecogi et Samboji avec leurs hordes sauvages."

By that time, it appears, the Vijayanagara Lord, being ever pressed back by the Mahomedans, had made Vellore his capital, and to the north of that town there remained but a small extent of territory subject to Hindū rule. In the course of a few years the Vijayanagara kingdom finally disappeared, and then after awhile came the rise of Hyder Ali, and the final extinction of Hindū dominion in the South of India.

Hindū law, then, can hardly have been revived by efforts of the Vijayanagara Rajahs, at all events in the countries of the extreme South of India, with which

alone I have to deal, and before the Vijayanagara Empire grew strong enough to reduce those countries to submission, they were for centuries in a state of complete anarchy. See the "Madura Manual."*

Whilst this anarchy lasted, and probably from before the very beginning of the Christian era, the southern kingdoms were the *Pāṇḍya* and *Çola*, the latter of which at one time reached far up into the land of the Telugus. And to the north of these two kingdoms lay various territories, parts of which have in comparatively modern times come to be known as the Mysore kingdom and Vijayanagara Empire. And the *Çēra* kingdom probably lay in old times along the Western Coast. But where lay the *Karṇāṭaka* and *Drāviḍa* and *Āndhra* countries? Doctor Burnell appears to have no idea†, and undoubtedly the question is one very hard to answer. Doctor Burnell indeed says plainly "there never was a *Karṇāṭaka* kingdom." And from Doctor Caldwells Grammar of the Dravidian Language, Introduction, it appears that *Karṇāṭaka* is the old form of the word that has been corrupted into *Canara*, and formerly was the generic name given by grammarians to two of the so-called Dravidian tongues, namely Telugu and Canarese. The same author seems to think that *Drāviḍa* is an old form of the word '*Tamil*,' and has been used by grammarians and others in very various senses, some of them having meant by it no more than *Pāṇḍya*, whilst others have meant by it a large group of languages including

* By J. H. Nelson, Madras, 1868.

† See his *Varadarājas Vyavahāranirṇaya*, Preface, v.



Marāṭhi and *Gujarātī*. *Āndhra* again appears to be the name given by the grammarians to the language of a people that migrated from Upper to Central India, and finally became known as the Telugus, in conjunction with the *Kalingas*. But Dr. Burnell seems to state* that Bhaṭṭa Kumārila about 700 A. D. used *Āndhradrāviḍa* to denote the Tamil tongue!

Whatever these puzzling terms may rightly mean, at all events it is abundantly clear that judges who undertake to expound Hindū law must be careful not to use them as if they connoted historical facts.

With regard to the authority of the supposed "Schools of Hindū law" Doctor Burnell has pointed out (V. V. Preface, vi.) that :—"The real authority is (as every one acquainted with Sanskrit philosophical literature must allow) that of the author himself..... It is really only necessary to distinguish between the *Dāyabhāga* and the *Mitākṣarā*." And it would be a very great gain if it could be ascertained with precision in what parts of India the *Mitākṣarā* is regarded by Hindūs as a work of authority, and for what purposes it commonly is referred to. I myself see reason to doubt whether any class of natives resident in the Madras Province regards the *Mitākṣarā* as a work containing rules by which it should guide itself in determining questions of succession and the like: and I should not be in the least surprised to learn that, with the exception of a few pleaders and others acquainted with the ways of the High Court, not a

* See his *Varadarājas Vyavahāranirṇaya*, Preface, vi, n.



soul in the Madras Province had ever referred to or heard of the *Mitāṅgarā* as a treatise on law.

It cannot be doubted for a moment by thoughtful men that what is supposed to be known at the present day about the inner life and social observances of the natives of India is for the most part pure assumption, and that in the hurry of business the judges and rulers of the land still continue to accept as solemn truths many of the wild fictions and baseless propositions of the earliest blunderers in the field of Indian lore. Amongst other things it is traditionally believed that every so-called '*Hindū*' to be found in the Madras Province, whether Brahman or non-caste, habitually settles disputes about property more or less in accordance with the rules and precepts of the *Mitāṅgarā*. It would of course be unsafe at present broadly to affirm that this belief is wholly unfounded, and that in fact the people of the Madras Province never guide, and never have guided, themselves by anything in the *Mitāṅgarā* contained: but I cannot help suspecting that such affirmation would be very near the truth, and that really the conduct of an ordinary *Cheṭṭi*, or *Maravan* or *Redḍi* of the Madras Province, unless indeed he happens to come into our courts as a litigant, is no more affected by precepts contained in the *Mitāṅgarā* than it is by precepts contained in the Psalms of David.

As to the 2nd false principle:—"That the so-called "*Hindū law*" is applicable to all persons vulgarly styled '*Hindūs*,' and to their descendants however



remote, and whether pure or not pure": The eagerness with which the Madras High Court has sought to extend the application of the very strictest Sanskrit ideas of law to almost every class of persons in the country except Mahomedans and Europeans, is simply marvellous. Not only has Sanskrit law been assumed to be applicable in its entirety to the *Maravans*,* a tribe of professional robbers and cut-throats whose apparent usages, manners and customs differ as widely as possible from those of the mild Hindū, it has declared that that law governs the illegitimate sons of an Englishman born to him by a Brahman concubine, because forsooth they are Hindūs! See *Mayna Bai and others*, v. *Uttaram and others*, 2 M. H. C., 196. And the extraordinary case of *Abraham v. Abraham*, IX. M. I. A., 195, shows clearly to what extreme lengths the late Madras Sudder Court was prepared to go in forcing Sanskrit law upon non-Hindū inhabitants of this country.

Doctor Burnell has observed†:—"Unquestionably the most important error thus introduced is the practice of considering Hindū (or Sanskrit) law as universally applicable to all persons vulgarly called Hindū, or even to persons of mixed descent. The notorious case of *Abraham v. Abraham* however proved too much for the Privy Council, and the decision in that suit has been productive of unmixed benefit.....

* See *Pandaiya Tēlaver and another v. Puli Tēlaver and others*, I. M. H. C. R., 478.

† *Varadarājas Vyavahāranirṇaya*, Preface, vii.

The Sanskrit law books practically mention only Brahmans, and exceptionally Çūdras, for the other castes do not exist; in Southern India, they can only be the laws of the so-called lower castes by custom, and it is very uncertain if there are any Çūdras at all, but in more than one case the strictest Hindū law has been applied for no good reason, and without the least enquiry as to its applicability." In these remarks I most heartily concur : and I sincerely hope that in the course of time the highest court of appeal in this Province will be more ready than it has hitherto been to inquire as to the applicability of Sanskrit law to the many rude tribes and castes constituting the bulk of the population of the Madras Province.

That there are good grounds for this hope will clearly appear from the concluding observations of Holloway, J., in his judgment in *Kāttama Nāchiār v. Dorasinga Tēvar*, 6 M. H. C. R., 310. The words used by that very learned judge are most memorable and full of promise. He said:—" *I must be allowed to add that I feel the grotesque absurdity of applying to these Maravars the doctrine of Hindū law. It would be just as reasonable to give them the benefit of the Feudal Law of real property. At this late day it is however impossible to act upon ones consciousness of the absurdity. I would not, however, be supposed to be unconscious of it.*"

It appears to me, with all due submission to the authority of the utterer of these words, that it is not too late now "to act upon ones consciousness of the



absurdity," but that judges must, and in time will, act upon that, and most resolutely. The Madras Civil Courts' Act, quoted at the beginning of this essay, makes it necessary to decide cases in accordance with "any custom (if such there be) having the force of law and governing the parties or property concerned," and therefore such customs should be diligently and patiently sought for by Madras up-country judges. And, if so sought for, probably such customs will be found in so great abundance, and of kinds so remarkable, that by and by Madras up-country judges will shrink from attempting to apply the Sanskrit law in the great majority of cases arising between ordinary non-Muhammadian natives of the Madras Province. This part of my subject will be treated somewhat fully in a later part of this essay: for the present I need say no more about it.

Principle No. III is: "That a custom which has never been "*judicially recognized*," cannot be permitted to prevail against distinct authority."

This most unreasonable and mischievous doctrine appears to have been broached for the first time in *Tāyumāna Reddi v. Perumāl Reddi*, 1 M. H. C. R., 51, where the existence of a custom amongst *Reddis*, relied on by the plaintiff, of a father-in-law constituting his son-in-law his heir in preference to kinsmen, was admitted by the resisting defendant, but the High Court nevertheless decided that such custom had not the force of law, and the decree upholding it in favor of the son-in-law "was at vari-



ance with known and fundamental rules of Hindū law" and therefore unsustainable.

The doctrine was however laid down for the first time in express terms in *Narasammāl v. Balarāmāchārlu*, 1 M. H. C. R., 420, where the question was whether the adoption of a sisters son is legally valid. Both the Court of First Instance and the lower Appellate Court had found an adoption of the kind to be valid, but on special appeal the Madras High Court decided in direct opposition to the opinion of Mr. Ellis and Mr. Justice Strange that, because the custom set up, even if it existed, could not be upheld by the Court "against the express language of the greatest authorities," a Brahman (of the *Āndhra* country?) cannot legally adopt his sisters son. Then in *Datti Parisi Nayudu v. Datti Bangaru Nayudu*, IV. M. H. C. R., 204, it was held that though the law recognizes concubinage amongst *Çūdras*, the illegitimate offspring of an incestuous intercourse between a *Çūdra* and his daughter-in-law cannot inherit or share in the family property. And in *Gopālāyyan v. Raghupatti Ayyan*, VII. M. H. C. R., 250, although the Civil Judge found on the oral evidence adduced before him that the existence of the custom of Brahmans adopting their sisters' sons "went back as far as 134 years, and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those among the people who are acquainted with the Shastras that such adoptions are valid, all go distinctly to



show a conviction among the people that they were acting in accordance with law," the High Court nevertheless declared that "In the case of Brahmans it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong," and that the adoption was invalid and inadequate of itself to create communion.

From the language of the judgments passed in these and other cases it appears clearly that the Madras High Court is firmly persuaded that the great bulk of the so-called '*Hindū*' population of the Madras Province live, or at all events ought to live, strictly in accordance with the spirit of the "*Hindū law*." Also it appears clearly that where one of the innumerable ancient customs of the aboriginal people that are opposed to the spirit of that law is brought forward, relied on and proved by a party to a suit, the chances are infinitely in favour of such custom being declared first not to exist, and secondly to be unworthy of judicial recognition because opposed to some rule found, or supposed to have been found, in a speculative treatise on Sanskrit law.

That the doctrine in question is erroneous may, I venture to think, be conclusively shown in a very few words. "*Judicially recognized*," with regard to a custom, must mean: declared by the courts, in deciding certain suits, to exist, and therefore to need to be upheld. But such declaration, when made in



a given suit, will decide the question only between the parties to that suit who respectively affirm and deny the existence of the particular custom; and if made in a hundred successive suits, will not bind one who in another suit denies the existence of such custom. In other words: Since in every case the existence of a particular custom of a tribe or caste is, if denied, a question of fact, and needs as such to be pronounced upon according to the evidence that may be adduced by the parties who respectively affirm and deny it, the question whether such custom does or does not exist cannot be finally set at rest by any number of uniform decisions, and judicial recognition of a custom practically is of no effect. Then when we come to the negative, that a custom not "judicially recognized" cannot "prevail against distinct authority", there occurs this insuperable objection, that the Sanskrit law-books (see Chap. III., below) expressly enjoin adherence to established customs, general directions and prohibitions notwithstanding. And the Privy Council, in the *Ramnád case* (Moore, I. A., Vol. IX.), has expressly declared that: "Under the Hindū System of law, clear proof of usage will outweigh the written text of the law."

Principle No. IV. is: "That a state of union is the normal and proper state of a Hindū family, and therefore non-division should in all cases be presumed until the contrary be proved." This is one of the most clearly established principles of "*Hindū law*"

according to the Madras High Court, but nevertheless is wholly erroneous.

In Nortons "Leading Cases" it is stated, at p. 173 Vol. I., that:—"Joint undivided family is the ordinary *status* of the Hindoo. Sometimes this has been termed joint-tenancy, sometimes co-parcenary: sometimes co-parcenary with a benefit of survivorship." And at Vol. II., p. 461, that:—"The ordinary *status* of a Hindū family is that of co-parcenary; insomuch so, that this is always presumed until the contrary is shown." These statements no doubt sufficiently represent the teaching of the Madras High Court about the ordinary plight of a Hindū family, and without stopping to remark on the palpable absurdity of using the Roman term *status* in this connection, or that of borrowing terms from the English common-law to describe things Hindū, I will endeavour to make it plain that the principle under notice is quite untenable.

Doctor Burnell has pointed out* that "the Sanskrit law expressly advocates division." And at pp. 3 and 4 of the work named in the foot-note will be found authorities for the proposition that separation or division is right. Thus Prajapati is shown to explain that "partition is to be made in order to the increase of *dharma*, by laying down this proposition, namely:—"So they may live together, or separately out of regard for *dharma*. (If they be) separate, *dharma* increases; therefore separation is right." (As to this see also Doctor Burnells *Dāya Vibhāga*, p. 8.) And

* Varadarājas Vyākṛāṇirṇaya, Preface, iv.

Vyāsa says :—" During the both parents' lives, the brothers are directed to dwell together ; (but) their *dharma* increases when separated in their (the parents') default." The reason why *dharma* increases when brothers separate is given by Br̥haspati, who says :—" The worship of *pitṛs*, devas and brahmans of (i. e. by) those living by one cooking (of food) would be single, (but) of divided persons that would occur in each (separate) house." As to this see also the *Dāya Vibhāga*, p. 7. In other words: Division leads to the multiplication of families, and thereby to the multiplication of performances of rites and ceremonies, and thereby to the enlargement of *dharma*.

Division being a good thing from the Hindū point of view, we should naturally expect to find it practically encouraged by the Sanskrit law, and it is a fact that division is so encouraged by that law. Doctor Burnell has pointed out* : " It must be noticed that Hindū law recommends and encourages partition. The right to it ceases with the fourth in descent, so undivided great great grandsons would lose their rights completely." As to this see also the *Dāya Vibhāga*, p. 14, where it is clearly stated that partition extends to the fourth in descent, and no farther.

Since the Sanskrit law-books both approve and practically encourage division of brethren upon the death of their parents, it is perfectly clear that the presumption of non-division is not justifiable in all cases in which the state of a Hindū family is called

* The *Dayadaçaploki*, 8, n. 3.



in question. But is it justifiable in any such case? Doctor Burnell says*: “No doubt such a presumption is justifiable as regards a father and sons, or as regards brothers; but it is, I think, going too far to extend it to such cases as where cousins are living apart.” I would venture to observe, however, that in the first place the idea of presumptions of law or of fact is wholly foreign to Sanskrit law; and in the second place, having regard to the rapid change that Hindū society is now undergoing, it is quite unsafe to presume (without proof) either division or non-division amongst members of a given Hindū family. Judging from my own experience of contested cases, I am disposed to think that where division is set up by a party to a suit, ordinarily its existence is a priori just as probable as that of non-division; and therefore the evidence that the parties can adduce to prove or disprove the fact should be considered and valued in the regular manner, without reference to any presumption based upon a view of Sanskrit law.

According to Professor Goldstücker, see the Appendix to his Paper* p. 52, “commensality, taken by itself, affords no legal evidence regarding the state of a family.”

At the same place Dr. Burnell remarks: “Practically there can be no doubt that division takes place comparatively seldom though the Sanskrit Law ex-

* *Varadarājas Vyavahāranirṇaya*, Preface, iv.

† “On the deficiencies in the Present Administration of Hindū law,” London, 1871.



pressly advocates it." As to this I would observe that if by "*division*" Doctor Burnell means a formal division, carried out strictly in accordance with principles of Sanskrit law, probably his opinion is quite correct, for estates worth dividing in such a manner must be rare in the Madras Province, and persons who care for the strict observance of Sanskrit rules of conduct still rarer. But it is an undoubted fact that year by year thousands of so-called Hindū families resident in the Madras Province are in effect permanently broken up by one or more members going to a distant place or to distant places, he or each of them hoping to make a fortune for himself solely. The pressure of poverty, the love of adventure, and the desire to escape the terrors of the law, are constantly operating powerfully on many thousands of individuals in this part of the world as elsewhere, and the informal division of families is rapidly becoming a common occurrence in every part of the Madras Province. This being so, whether the presumption in favor of non-division is a fair and proper presumption, is a question of very great importance. That in very many cases the grossest injustice is done to industrious and enterprising adventurers, in consequence of this presumption obtaining, there can be no sort of doubt. As to partition, its signs and effects, confer West and Bühler's Digest.

Principle No. V. is: "That as to ancestral property a son, and therefore a grandson, may compel



a division against the will of his father or grandfather."

To an inquirer moderately well acquainted with the simple, self-repressive habits of thought of the natives of this Province, and who knows with what tenderness and reverence the younger members of a family usually regard the elder, this doctrine must surely appear to be nothing short of monstrous. It was promulged, however, by two English lawyers, Scotland, C. J., and Bittleston, J., apparently after a most slight and superficial consideration of the merits of the very important question before them, and became the basis of decision in *Nagalinga Mudali v. Subramaniya Mudali*, 1 M. H. C. R., 77, and has ever since continued to be one of the most important doctrines to be found in the Madras High Court Reports. How vast an amount of injustice has been caused by the decision in that case, it is of course impossible to guess: we must hope that its power for evil has been restricted to a great extent by the general ignorance of the people as to what from time to time takes place in the highest tribunal in the land, and that before many years shall have elapsed, this doctrine will have ceased to obtain.

The learned judges who decided the above case were well aware that Sir Thomas Strange had come to the conclusion that in the Madras Province a son cannot in any circumstances compel partition of wealth against the will of his father, but resolved to adopt the contrary dictum of Mr. Justice Strange,



given in Sec. 238 of his Manual of Hindū Law, to the effect that: "Sons may at their will and irrespective of all circumstances, compel their father to divide with them the ancestral property." Of this dictum Scotland, C. J., says that it "states the law in the broadest possible terms," and no doubt it does: but terms may be too broad, and in my humble opinion there is no solid foundation for Mr. Justice Stranges highly inconvenient proposition, which will be found to be based wholly and solely on an isolated passage in the *Mitāxarā*. I have already expressed my doubts as to whether there is any good reason, or indeed any reason, for assuming that that treatise, which is styled in the judgment under notice the "*governing authority in this Presidency*," and elsewhere the "*paramount authority*" and the like, in fact is considered by any of the tribes and castes of this Province, whether Brahman or non-Brahman, to be an authority upon matters of succession and inheritance. But conceding for arguments sake that the *Mitāxarā* is regarded by the people at large as an authority of the very highest order, let us go on to examine the passage upon which Mr. Justice Strange based his dictum, and see how far its language will warrant an opinion either way. Before doing so, however, it may be well to observe that whilst both Scotland, C. J., and Bittleston, J., appear to have found it difficult to make the passage consist with rules previously laid down in the *Mitāxarā* itself, and the latter learned judge candidly admitted that "it is



not easy to follow the reasoning of the *Mitāvarā* on the subject," it seems to be tolerably certain that the decision in the case was arrived at because Sir Thomas Strange had given his opinion somewhat doubtingly and with limitations, whilst Mr. Justice Strange, coming after him, had given his opinion undoubtingly and absolutely.

The isolated passage in question, Chap. I., Sec. V., Para. 8, as rendered by Colebrooke, runs as follows, namely:—"Thus, while the mother is capable of bearing more sons, and the father retains his wordly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." Now, assuming the Sanskrit to have been correctly done into English, and that it is fair and reasonable to base an important doctrine on an isolated dictum, three things occur to one at once upon carefully looking at the words of the passage, and these are: (1.) That the word '*thus*' shows that the proposition is the summing up of, or a deduction from, something previously declared; and (2.) That since there is nothing to explain or qualify '*partition*,' that word may mean not partition of wealth generally, but partition of the grandfathers estate in particular; and (3.) That "*by the will*" may mean in respect of equality of shares, not in respect of the act of partition.

The passage may mean, therefore, quite literally: "So it is, that: If the father, whilst the mother and



he are still vigorous, resolves to separate his sons from him, but in doing so desires to give his sons no part of the wealth that was acquired by his own father, the sons can properly claim to have that wealth fairly divided amongst them at the time of separation."

That the passage really does mean this or something like it, will appear to be very highly probable when the Section of which the passage forms part is considered as a whole, and when we turn to other authorities upon the point and find, as we shall, that all of them declare by more or less intelligible and positive words, that whether partition or division shall or shall not take place during the lifetime of the father, depends wholly and solely on the father's will, so long at least as he continues to be master of himself, and physically and morally able to manage affairs.

Scotland, C. J., in the judgment under notice quotes, as strengthening Mr. Justice Stranges view of the meaning of the passage above set out, the 11th paragraph of the same Section of the *Mitākṣarā*: "Manu likewise shows that the father, however reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather," but the text of Manu referred to (IX., 209) is thus translated by Colebrook (Dig. V., Chap. II., Sec. XCI.): "And if a father, by his own efforts, recover a *debt or property unjustly detained*, which could not be recovered before *by his father*, he shall not, unless

by his free will, put it into parcenary with his sons, since in fact it was acquired by himself." Nothing is said here explicitly or implicitly as to sons claiming a division *when* they please: all that may properly be said to be implied is, that the father may not deal as he pleases with property not acquired by himself. As to this, confer Doctor Burnells *Dāya Vibhāga*, 13—17.

The real meaning of the isolated passage under notice (paragraph 8) is to be looked for, it seems to me, not in paragraph 11 but in the summarizing paragraph 10, which according to the side-note "explicitly states the difference," namely between the right of the sons over things acquired by the father himself, and over things acquired by the father of the father. And that difference seems to be nothing more or less than this: Over the former the right is such that the sons must perforce acquiesce in the fathers disposal of them. Over the latter the right is such that the sons may legally restrain the father from unnecessary alienation of them.

The first seven paragraphs of the 5th Section appear to contain nothing as to any time when, or circumstances in which, a partition of wealth may of right be claimed by sons. They appear to describe simply the right mode of calculating the shares of grandsons when a division is made of the effects of the deceased grandfather, upon the death of the father.



The first paragraph contains only a short text. The 2nd expounds that text in the clearest possible language, showing that the shares are allotted to the sons: and only those grandsons take allotments, whose fathers are dead at the time of the distribution: "surviving sons taking their own allotments." The 3rd paragraph seems to declare, though in singularly obscure and unsatisfactory terms, that partition "with the grandson" cannot take place in particular cases where the father lives, because of the general principal that shares are to be allotted only when the father is dead: or if partition does take place (in consequence of the importunity of the grandsons?), the father may make an unequal distribution as if he were dividing property acquired by himself. The 4th paragraph defines certain words. The 5th seems to mean that where a share of property acquired by the grandfather has been allotted to the father and his sons, the father's right over it is identical with that of the sons, and if the father separates his sons from him, he has not power to divide such share amongst his sons as he pleases, or to keep a double portion of it for himself. The 6th observes that, because this is so, "the allotment of shares according to the fathers" is ordained by the text. The 7th explains that the prior enactment about partition (in Sec. II., § I) and various texts relate only to property acquired by the father himself. And then we come to the passage under notice. And the meaning of it would seem to be

that :—If the father resolves to separate his sons from him before his wife has ceased to bear children, and whilst he himself is still vigorous and worldly-minded, he cannot, when he divides the estate, decline to give to his sons fair and equal shares of the share of property acquired by the grandfather, that was allotted to the father when he and his brothers divided amongst them the grandfathers estate. Over that share of property the father has a right jointly with his sons, he and they have “the same ownership” in it, and therefore the father may not divide it unequally or keep for himself a double portion of it.

It would be tedious, and I think superfluous, were I to set out here all the authorities I could discover bearing on the power of sons over property : but it will not be amiss for me to cite a few, leaving it to those who may wish to investigate the matter more closely to turn to the Digest and other repositories of learning.

The correct doctrine possibly may be that the sons can force the father to separate them from him in two cases, and in two cases only, that is to say : (a) If the father from old age or otherwise becomes physically incapable of managing affairs : and (b) If the father by moral delinquency and misappropriation of the family property renders himself unfit to continue manager of the family. But even in these cases it would seem to be very doubt-



ful whether the sons can call upon the father to divide the estate. The eldest son resembles the father, and probably should carry on the management of the family in his place until the father dies.

As will be found in the Digest, Book V., Chap. I., Sec. I., Art. 2:—

Manu says:—"After the death of the father and the mother, the brothers, being assembled, may divide among themselves, in equal shares, the paternal *and maternal* estate; but they have no power over it while their parents live, *unless the father choose to distribute it.*"

Devala says:—"After the death of the father, sons may divide his estate; but they have not ownership, *or full dominion*, while a faultless father lives."

Nārada says:—"The father being degraded, or become an anchorite, or having resigned, or demising naturally, his sons may divide his estate."

Sankha and Likhita say:—"Since partition of the estate takes place after his decease, sons cannot divide it while the father lives, even though it were acquired by them independent of him; they have no power *to make such a partition*, since they are not their own masters in respect of wealth or religious duties." And in another place they say:—"Should the father be incapable, let the first born manage the affairs.....Not without the fathers consent, can a partition of the property be made."

Hārīta says :—“ While the father lives, sons are not independent in respect of the receipt, alienation, and recovery of wealth ; but if he be prodigal, absent in a remote country, or afflicted with disease, let the eldest son manage the affairs.”

These and other old authorities are to be found in the Digest, *ubi supra*. For modern ideas we may turn, with the same result, to Doctor Burnells translation of the *Dāyadaçaçlokī* of which the opening verse tells us :—“ A father can separate his sons, his wife, and himself, at his own will, in case of self-acquired property ; *he can do so, all sharing* equally, in case of inherited wealth ; if he *be* without sensual desire, *such partition* is at his son’s will. If *he have only* one son, the father takes two shares, *and* the wife then does not get a share. When he, *the father*, is dead, the others *are* equal *as regards* shares. Grandsons who have lost their fathers *take shares* through their fathers.” So far as I can see, nothing can be clearer than the general sense of these words : Ordinarily, the father may separate his sons from his wife and himself, giving them what shares he pleases of his self-acquired property, but only fair and equal shares of inherited property. If, however, the father from old age or other cause has ceased to care for the gratification of the senses, his sons may, upon his directing separation, claim a fair and equal division and allotment of all the property. When the father dies, and (ordinarily) not till then, the members of his family may divide the family



property amongst them in equal shares. Grandsons, however, who have lost their fathers and thereby acquired a right to shares, will take the shares of their respective fathers per stirpes.

The *Dāyadāṣaṣṭlokī*, Doctor Burnell tells us in his preface, is a short, practical treatise, compiled probably not more than a century ago by a native of South India, and "contains all the chief rules of Hindū law as laid down in the received treatises, and, so far, cannot contribute false notions." We may hope, therefore, to find in it what the Hindūs of South India have accepted as the true doctrine about so important a matter as the power of the sons over the property of the family : and when that doctrine agrees with what may be gathered from the chief treatises on Hindū law, students may, I think, without great danger take it to be sound and true.

The indirect results of erroneous doctrine obtaining upon this point are most serious. One of them is the conclusion that because the son may at any moment force the father to divide the ancestral wealth, therefore the courts may order partition of the estate of a family in order to satisfy debts incurred by a single member without the consent of the rest. This conclusion will presently be considered.

Principle VI. is : That:—"A member of an undivided family can aliene joint ancestral property to the extent of his own share."



This doctrine also appears to have been first promulgated by Scotland, C. J., and Bittleston, J., in deciding *Virasvāmi Grāmini v. Ayayaswāmi Grāmini*, 1. M. H. C. R., 471, and to be as unsound, unreasonable and pernicious as that of Principle No. V. Conscientiously adhered to, it leads the courts to commit the grossest injustice in many instances; and in the course of time, unless happily exploded, undoubtedly will be the ruin of thousands of respectable families. Suppose a thrifty Brahman having one son succeeds to the management of a small estate left by his father, and that son upon reaching the age of sixteen is speedily corrupted by evil company, and induced privately to sell his unascertained share; and the father knows nothing about the matter; and after a while bad times come, and the father thinks to raise money by mortgage; and then the sons vendee, perhaps a Pariah money-lender, comes forward and declares himself to be co-owner with the father. Surely in such case the wretched father might well be excused for cursing the authors of this monstrous doctrine? Or again suppose a large estate heavily incumbered by mortgages, and owned jointly by two or three brothers and some sons of other brothers; and a new manager of the joint estate resolves by prudent management to clear the incumbrances and bring back the family to a state of prosperity; but one of the younger members secretly sells his unascertained share to a usurer; and when the



fate of the family is trembling in the balance, the usurer comes forward and suddenly sues for partition. In such case the ruin of the family would be certain and complete. And it would be attributable wholly and solely to the establishment of this doctrine.

The positive reasons for Scotland, C. J., deciding as he did,—Bittleston, J., did not deliver a separate judgment,—appear to have been, that (1.) the Supreme Court seemed always to have supported the doctrine in question since a certain case; and (2.) Colebrooke had expressed an opinion favorable to the validity of alienation by an undivided member to the extent of the alienors own share; and (3.) Sir T. Strange had expressly said a certain thing.

With regard to the alleged practice of the Supreme Court, I am unable to ascertain what it was, but it seems to be quite clear that even if it was all that it is stated to have been, it arose from a judgment pronounced in a case in which it was not necessary to settle the general question of the nature and extent of the right of an individual co-parcener over joint property. So far as appears, the only question in *Ramasawmy v. Seshachella* was whether the interest of a minor was to be held to have been affected by a particular act done by his elder brother, after the death of the father, apparently without necessity.

As regards the opinion of Colebrooke, which may be found at p. 343, II. Strange, edn. 1830, it is to be

observed that:—(1.) It was given evidently with much hesitation, in very general terms and subject to important limitations, and without the support of authority, and altogether, as it stands recorded, is eminently unsatisfactory as the basis of a judicial decision: (2.) It was given not from the bench, but in a friendly letter sent from Bengal to the then Chief Justice of Madras, who had been puzzled about a case, and had asked Colebrooke for advice and guidance: and (3.) The question about which Colebrooke's advice and guidance was sought and given was quite different from the question that arose in the High Court case now under notice.

The question that had puzzled the then Chief Justice of Madras, so far as can be gathered from the statement at p. 343, II. Strange, was whether a certain Hindū, who upon the death of his father had succeeded to the management of the family estate, and had borrowed money apparently not for the benefit of the family, had so mortgaged the family lands as to bind the share of his only brother being a minor. "The Sastree, Venkatasa, certified that, under the circumstances stated, the act of the elder brother could not prejudice the rights of the younger." And after a time there was the reference to Colebrooke, and his opinion was given to the effect that the Chief Justices view of the law "on the two first points, as stated by him" was undoubtedly correct, and with regard to the third point,—it does not appear how any of the



points was stated,—Colebrooke took the law to be :
“That the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor.” In other words: Colebrooke averred, what few would venture to deny, that one may not, without sufficient authority, aliene what belongs to another. But the truth of his proposition in no way affected the particular question now under consideration. And whether A, being the managing member of a family, in certain given circumstances could or could not by his act legally oblige the share of his minor brother B, is a particular question not intimately connected with the general question, whether ordinarily a member of a joint Hindū family can by his own separate act validly aliene joint ancestral property, being managed by another member of his family.

Then as to the thing expressly said by Sir T. Strange, namely, that: “In favour of a bonâ fide alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition.” This very rash suggestion, made at I. Strange, p. 202, has not a particle of authority to support it, and follows, naturally enough, some loose speculation upon the policy of the law in respect of pleading ‘*want of notice*’ and other



matters dear to the heart of an English lawyer. The suggestion appears from Sir T. Stranges notes at the foot of p. 202 to have been borrowed from Colebrooke, and a reference to the Appendixes in the 2nd Volume shows at once that Colebrooke had been as speculative as, though incomparably less rash than, his pupil. At p. 349, II. Strange, is a brief remark of Colebrooke to the effect that in setting aside an unauthorized sale of joint property by a co-parcener "equity would require redress to be afforded to the purchaser, by enforcing a partition of the whole, or a sufficient portion of it, so as to make amends to the purchaser out of the vender's share" and then at p. 431 of the same will be found Colebrooke's answer to the specific question: "can a Hindū of an undivided family dispose of his property by will, and to what extent?" in which upon a review of all the authorities, and particularly the *Mitāxarā*, he declares in unqualified terms that except in Bengal the alienation by a co-parcener of joint property to the extent of his own share is prohibited and invalid, except in cases of distress, &c., and then he concludes with the purely speculative and unnecessary suggestion: "Injury and injustice may, however, be prevented, by holding him" (the co-parcener who alienates without authority) "and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one." I have



italicized these lines because they appear to be the real foundation of Scotland, C. J.'s decision, though apparently they were not read by him before he decided the case under consideration. The suggestion has absolutely nothing in the shape of authority to support it, and evidently was prompted by an English lawyers love for the legal institutions and jargon of his own country.

A still more remarkable decision of the Madras High Court will be found at p. 416, II. M. H. C. R., in *Palanivelappa Kaundan v. Mannāru Naikan and another*. The learned judges who decided that case announced that: "The principle upon which, following the suggestion of Sir T. Strange and Mr. Colebrooke, the courts have of late years satisfied the contract of one individual member out of the share which would come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that he could, if disposed at any time, according to the doctrine of the Madras school enforce a partition, and that it is only just that, where he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was ultra vires, but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement. It is quite clear that on the theory of the Madras school there is no distinction between a father and other co-parceners."



And then we have the ever memorable case of *Rayacharlu v. Venkataramaniah*, IV. M. H. C. R., 60, in which a son sued his father, and it was declared that: "A son during the life of his father has, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive. The father, to the extent of his own share as co-parcener, is entitled to make valid dispositions, and it is not until his death that any interest arises to the son as heir."

In the decision in this case express reference is made to the two cases above noticed and to no other case. And I believe there can be no doubt that the three cases together are regarded by the courts of the Madras Province as abundantly warranting such conclusions as that in an ordinary Hindū family, and in respect of ancestral lands, one co-parcener has as extensive a right as another; father and son are on precisely the same footing; and any member, not being a minor, may at any time utterly ruin the family by effecting secret alienations of the joint estate, "to the extent of his own share."

My experience of the habits and feelings of the people of the extreme South of India makes me look upon these conclusions as not only erroneous but most harmful: and in my humble opinion the mischief that has been and must hereafter be worked by the courts in consequence of these conclusions having been adopted, is so serious as to call for an inquiry



by Government as to the extent of the mischief, and the propriety of promptly abating it by special legislation.

When we look for the reasons upon which English lawyers have based the astounding proposition that in Madras the right of a Hindū son is in no respect inferior to the right of the father in respect of joint ancestral property, absolutely none of any validity can be discovered. In the earlier of the three cases Scotland, C. J., cites by way of authority the supposed practice of the Supreme Court "since at least the case of *Ramasawmy v. Sashachella*," and the opinions of Sir T. Strange and Colebrooke. In the next of the three cases reference is made to the principle upon which the courts had of late years acted, following the suggestion of Sir T. Strange and Colebrooke, as understood in the first case. And in the last case the proposition announced appears to have been deduced from the doctrines established by the first two cases. Everything therefore depends upon the reason for the decision in the first case.

It has already been shown that Colebrookes private opinion was given with reference to a case in which the question was quite different from the question whether a co-parcener can validly aliene joint ancestral property to the extent of his own share. And that case was the very case, *Ramasawmy v. Sashachella*, upon which according to



Scotland, C. J., the alleged practice of the Supreme Court was founded.

Really, therefore, the existing Madras doctrine that the right of a Hindū son is not inferior to that of his father in respect of joint ancestral property, is founded upon nothing better than the unsatisfactorily obtained certificate of a certain Pundit that, in a particular case, "under the circumstances stated, the act of the elder brother could not prejudice the rights of the younger," and the decision in that case, together with some vague and unsatisfactory remarks made by Colebrooke in a private letter sent to Madras from Bengal in answer to a letter containing some unknown questions asked in connection with that case, and lastly a speculative and wholly unauthorised suggestion of Sir T. Strange, borrowed from an uncalled for expression of opinion by Colebrooke. It seems almost incredible that this can have happened, but the Madras High Court reports seem to make it certain that the history of the doctrine is as I believe, and have represented it to be.

That the doctrine is wholly erroneous, seems to be clear from consideration of amongst others the following circumstances, namely:—

1st. It is an undoubted fact that amongst the so-called Hindūs of the Madras Province the Father is looked upon by all at the present day as the Rajah or absolute Sovereign of the family that depends upon him. He is entitled to reverence during his life, as he is to worship after his death. His word is law, to be



obeyed without question or demur. He is emphatically the '*Master*' of his family, of his wife, of his sons, of his slaves and of his wealth. And according to the commentary on the Aitareya Brāhmaṇa " Sons call now their father, governor and arbitrator." Professor Max Müller, *Ancient Sanskrit Literature*, 2nd edn., p. 423.

2ndly : Sir T. Strange speaking of the Father says, at Vol. I., p. 64, referring to Manu and others : " The members of his family can, in general, have no wealth of their own, any more than a wife or a slave ; whatever they may earn being regularly acquired for him, *to whom they belong.*" The italics are mine.

3rdly : There is the central idea of the Sanskrit law that the only legitimate use of property is the use of it for the promotion and enlargement of *dharma* or virtue, which Professor Max Müller says is the quality of the individual self, which arises from action, leads to happiness and final beatitude, and is called *apūrva* supernatural." And the principal mean of promoting and enlarging *dharma* is the due performance by the family of sacrifices, worship and ceremonies. It would be improper, therefore, for a member of a family by a separate, independent act to diminish to any extent the common property of the family, and thereby curtail its power of promoting and enlarging *dharma*. And where the Father is the managing member, such act done by a dependent son would be inconceivably improper.



4thly: Whatever the Supreme Court may have done "since the case of *Ramaswamy v. Sashachella*," the Madras Sudder Court appears to have adhered steadily to the old-fashioned doctrine that: "None can dispose of joint property (especially immovables) without consent of the sharers." See II. Strange, p. 349. Thus, if the three decisions cited by the defendant in the earliest of our three cases be turned to, it will be found that in S. A. No. 123 of 1859 the Court decided that: "The sale of property by an undivided member is not valid, even if falling within the limits of his individual share, unless made under emergent circumstances and with reservation of the shares of his sons, and a sufficiency for the maintenance of his wife and daughters." In S. A. No. 183 of 1859 it will be found that: "There not appearing to have been any emergency in this case, the Court held the sale by the 1st defendant's father, although the managing member, to be invalid." And in S. A. No. 119 of 1858 the Court agreed with the Lower Courts in declining to give validity to a sale of family property by two or three undivided cousins, it not appearing to have been made in consequence of pressing necessity. In each of the Sudder Court cases it will be observed that the managing member of the family was not the Father, and yet the Court would not give validity to a sale by one of the co-parceners acting solely, whether he was the managing member or not. A fortiori it would not have given validity to a sale



unnecessarily made by a son of joint property managed by the Father.

It is perfectly true that in two of the three Sudder Court cases referred to by Scotland, C. J., as favouring his view,—the third I cannot find,—the Court found that the share of an undivided co-parcener was liable for his debt. But in neither case was the debt incurred by a son under the protection of a father managing the family, and the decisions are too meagre to admit of our knowing in what circumstances the debts were contracted; possibly they were thought to be emergent. On the other hand the defendants in the High Court case under notice might have cited many more Sudder Court cases, the decisions in which as a whole seem to prove that generally the Sudder Court felt no doubt whatever as to the superiority of the right of the Father, and the inability of any co-parcener to alienate joint family property by his own separate, independent act, except under emergent circumstances, and for the good of the joint family, actually or constructively. See Special Appeals 27 of 1850, 48, 54, and 83 of 1854, 12 and 52 of 1855, 95 of 1856, 176 of 1858, and 76 of 1859. The decisions that were cited by the defendants and noticed by Scotland, C. J., would seem to have been treated with scant courtesy, and it is difficult in considering what is said of them to avoid suspecting that the new High Court was fain to despise the old Sudder Court, and the old Pundits who had furnished that court with learning.



5thly : In the case of *Ramasawmy v. Sashachetta* itself the Pundit was asked not whether the mortgage of family property made by one of two brothers was valid, in which case he might have said absolutely, no ; but whether the debt " was chargeable, beyond the share of the elder brother, on the paternal property." The question being thus put, he made answer in general terms that the act " could not prejudice the rights of the younger." Colebrooke would seem to have noticed this, and took occasion to observe that Hindū subtlety might object that the elder brothers act was not maintainable "*even for his own share.*" And then he goes on to consider what appears to have been the principal question put to him, in what cases the consent of sharers is implied and may be presumed, for the purpose of giving authority to an otherwise unauthorized alienation of joint property by a single member. And his subsequently given opinion, noticed above at p. 52, distinctly and emphatically denies the validity of such an alienation.

6thly : In Nortons Leading Cases, Vol. I., pp. 212 et seq., several decisions and dicta are quoted as going to show that a single co-parcener cannot validly aliene joint family property in any part of India, and particularly the Full-Bench decision of the Calcutta High Court in *Sadabart Prasara Sahu v. Foolbux Koer*, 3 Beng. L. R. p. 31, in which the Court, after reviewing the principal Madras case and divers authorities upon the point, decided that under the *Mitāxarā* a co-sharer cannot, without the consent of his co-



sharers, mortgage for his own benefit his undivided share in a portion of the joint family property.

7thly : There is the following distinct declaration in the important Privy Council case from Madras, *Appovier v. Rama Subba Aiyar*, XI. M. I. A., p. 75, that : " According to the true notion of an undivided family in Hindū law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share..... The proceeds of undivided property must be brought, according to the theory of an undivided family to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family." The general truth of these propositions, at least for the Madras Province, can hardly be doubted. And it would seem to be a logical consequence of them that under the Hindū law a co-parcener cannot validly aliene joint family property. For certainly a co-parcener does not own the whole of the joint property of his family, and the first of these propositions is that he does not own a certain definite share thereof; he must therefore, as usually is held, own an uncertain, indefinite interest. And such interest must be all that he can in any circumstances affect to aliene. But, if aliened, such interest can in no wise benefit the alienee so long as the family remains undivided, for the second proposition is that all the proceeds must be brought to the common chest or purse. There-



fore it can only be in the event of partition of wealth taking place that the alienation of an uncertain, indefinite interest can benefit the alienee. But in an ordinary Hindū family the formal partition of wealth never or very rarely takes place. Consequently such alienation can never or very rarely benefit the alienee. But in the few cases in which the formal partition of wealth does take place, and the alienor gets a certain definite share allotted to him, ordinarily the alienee will be scarcely the better for it, inasmuch as generally speaking every Hindū marries and surrounds himself with a more or less numerous family of his own, and the certain, definite share of ancestral wealth allotted to our supposed alienor almost certainly will be allotted to him not for himself solely, but in his capacity of manager of his own sub-family, and for the joint use and benefit of his sons and others as well as himself. And to the state of this new family, broken off from the old, the two propositions of the Privy Council will apply in their integrity as strictly as to that of the old, so that until the new family in its turn divides, no benefit will accrue to the alienee. And in such circumstances it would be idle to expect such family to divide. In effect, therefore, supposing an ordinary Hindū family to be living together in union in accordance with the theory of the Hindū law, the alienation of its property by one of its members cannot be in any degree valid or operative.



Sthly: It was solely in order to meet this obvious difficulty that Colebrooke, in his remarks on the case at II. Strange, 349, said in his haste that '*equity*,' by which he must have meant the High Court of Chancery if called upon to deal with such a case according to English ideas of right, "would require redress to be afforded to the purchaser, by enforcing a partition." Some years later, however, when he was asked his opinion about the power of a Hindū member of an undivided family to dispose of his property by will, see II. Strange, 431, he spoke much more guardedly about possibly void alienations of joint property, and expressed his opinion that "injury and injustice may, however, be prevented by holding the alienor and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award partition, for the purpose of enforcing payment from his share thus rendered a separate one." It will be observed that this opinion is a mere loose suggestion thrown out by the way, and not at all called for by the question put to Colebrooke. And no authority is given for it. I would ask therefore: What is there in all the Sanskrit law-books together that can be held to favour the to a Hindū mind most astounding proposition, that a court of law may forcibly break up a united family, and scatter its joint possessions to the four winds of heaven, in order to prevent injury and injustice being done to a stranger by the unauthorized and therefore void act of one of its members, or even to make amends



to a stranger for an injury done to him by a single member of the family without the knowledge of the rest?

To sum up the whole matter: It seems to me to be clear that the history of the doctrine in question is simply this. Certain English lawyers, with their minds full of English notions about contracts and torts and the salutary operation of equity, and losing sight altogether of the Hindû religious idea of the family and of the one right use of property (for *dharma*), were struck by the apparent hardship of an innocent purchaser for valuable consideration without notice getting nothing by his contract with a single member of a family, or of a householder failing to get pecuniary compensation for a wrong done to him by one of several co-sharers, perhaps the seduction of his wife or daughter, and resolved to redress such hardship by equitable interference. The only way of doing so seemed to be by enforcing partition, and thereby making a definite share of property available, and accordingly it came to be resolved that the courts shall at any time, whether asked by the co-sharer himself or by a stranger, ascertain and separate the right of a co-sharer over the joint ancestral property of his family.

Principle VII. is: "That self-acquired property ordinarily is indivisible."

Whether "*self-acquired property*" is or is not subject to partition together with "*ancestral property*," is in every case a question, the solution of which de-



pend, speaking generally, upon the mode of acquisition. Thus Doctor Burnell observes* :—"The term "self-acquired" has nothing to do with the claim of members of the family to share in such property, that depends upon another distinction which can only be made with regard to self-acquired property—whether it is divisible or not. In the Courts a common answer to a suit to recover property alienated by a former member of a Hindū family is the simple statement that the property in question is self-acquired; but such an answer is little better than none at all, for except in a very few and well defined cases, all self-acquired property is, beyond doubt, divisible. The principle that decides this question is very simple, and may be broadly stated—whatever an undivided member of family gains by use of family means directly or indirectly is *divisible*; all else (and this necessarily in only a very few cases) is his *indivisible* self-acquired property, and this last class also includes a few things which, from their nature, cannot be divided. Thus all possible cases of indivisible self-acquired property are but very few at the most, and in regard to these it should be observed that the question as to whether such acquisitions are divisible or not, can only arise on partition. As long as a family is undivided, so long must it necessarily be impossible to predicate of any particular article, that it is the indivisible self-acquired property of any individual member. The general view which one finds prevailing in the Courts

* Varadarajas Vyavaharanirnaya, Preface, ix.



is the contrary and untenable." And see Professor Goldstückers Paper, 18.

Doctor Burnell has not thought it necessary to cite any cases in which the Madras High Court has improperly used the term "*self-acquired*," being no doubt of opinion that the misuse was notorious. At I. M. H. C. R., 412, will be found the case of *Varadiperumal Udaiyan v. Ārdanāri Udaiyan*, in which the Court is reported to have laid down as indubitably sound law that in the Madras Province an undivided member of a Hindū family "during his life is entitled to the separate enjoyment of his self-acquired immovable property, with the right, if he have no male issue, to alienate the same." It is obvious, however, that this proposition is untenable unless the condition be added, that the mode of acquisition was such as to make the property '*indivisible*': whilst excellent reasons exist for thinking the proposition absolutely untenable. Then at II. M. H. C. R., 369, will be found cases in which the term "*self-acquired property*" is used in a loose and unsatisfactory manner. And in the case of *Muttu Viran Chetty v. Rani Kattama Natchiyar*, IV. M. H. C. R., 403, it is laid down broadly that a Zemindary "was the self-acquired property of the Istimrar Zemin-dar, and therefore there can be no question as to his right according to the general Hindū law, to make the alienation, at least in the absence of any male issue."

Other cases might easily be found in which it has been wrongly taken for granted that all self-acquired property is by its nature indivisible. It will suffice to



remark in conclusion that Nortons "Leading Cases" speaks of "*self-acquired property*" as if it were never divisible, at I., 174, and in many other places. And Mr. Grady, who of course relies for his information exclusively on reported cases, defines this species of property as: "What a person enjoys independently of any co-sharer, and is acquired by his own personal exertions without any assistance from the joint estate, &c., &c." As Doctor Burnell points out*, this defines indivisible, and disregards divisible, self-acquired property.

Principle VIII. is: "That debts incurred by the managing member of a Hindū family should be presumed, in favor of a minor, not to have been incurred for the benefit of the family."

In *Tāndavaraya Mudali v. Valli Ammal*, I. M. H. C. R., 398, it had been decided by the Civil Judge, no doubt wrongly, that a certain debt incurred by the elder brother who was the head of the family must be presumed to be a family debt, for which the younger brother though a minor and the family property must be held liable; and the High Court on Special Appeal reversed the decision, on the ground that: "It was incumbent on the plaintiff to adduce some proof that the debt was contracted *bonâ fide*, and for the benefit of the family: but this she has altogether failed to do." The decision in this particular case, founded on the principle enunciated in *Hanoomanpersaud Panday v. Mussumat Babooee Munraj Koonwerar*, 6 Moore I.

† *Varadarājas Vyavahāranirṇaya*, Preface, ix.



A. C., 393, was no doubt correct. But the High Court has gone much further in the decision at VI. M. H. C. R., 371, in the Regular Appeals by *Saravana Tēvan* and others, and the doctrine at present obtaining with regard to impeached alienations of a minors share of joint family property by the managing member, seems to be that, ordinarily, the vendee or mortgagee must prove positively the need of the family; or if an old debt is set up, not only that the purchase money or mortgage amount was actually paid by him to the alienor for the purpose of discharging such debt, but also that he previously made sufficient inquiry as to the fact of the debt being an obligation on the family and as to the sale or mortgage probably being a prudent arrangement for its discharge. That is to say: The courts must presume in favor of a minor, until the contrary is proved, that the managing member who aliened the minors share, acted illegally or fraudulently.

It has been observed before that presumptions are quite foreign to the Hindū idea of law. And it seems to me that the tendency of the High Court to turn conclusions rightly or wrongly arrived at in particular cases into presumptions applicable to all cases of a like species must be a fruitful source of danger to the so-called Hindū community. In the decision last mentioned the Court goes so far as to call its suggested presumptions, that till then had never been heard of by a single judge in the Madras Province, "*these settled Rules*,"—the Capital R is used in the report,—and



there can be no doubt that an ordinary District Munsiff, upon reading the report of this case, will consider the '*Rules*,' so far at least as he can understand them, to be neither more nor less obligatory on him than a section of the Indian Penal Code.

With regard to the propriety of the presumption under notice, it is to be observed in the first place that what may very properly be suspected in the case of a young brother who has but recently succeeded to the management of an estate, may not properly be suspected in the case of a grey-headed Father who has ably protected a dependent family for thirty years. And the minor who impeaches a transaction shortly after he comes of age, ordinarily may be regarded by the court with far greater favour than the minor who waits for ten years after attaining his majority before he objects to what has been done. And an alienation effected by a managing member who conducts extensive mercantile operations naturally provokes far less suspicion than does one effected by a managing member who only farms a few acres of land. In short, judging from my own experience of impeached alienations of ancestral property, I should be inclined to say that the circumstances of ordinary cases vary so greatly that no a priori presumption against or in favour of a minor can safely be adopted. On the one hand we see many instances of men colluding with their fathers or brothers to cheat innocent alienees: on the other hand we see many instances of profligate or imprudent man-



agers of families needlessly making away with joint family property. On the whole, however, I imagine that the former class of cases greatly out-numbers the latter. And I hear constant complaints of the daily increasing difficulty of getting a fair price for land, and of borrowing money on the security of land, bred by the proneness of sellers and borrowers to set up sons and other co-sharers to impeach the validity of honest and proper alienations. Natives who should know, assure me that the value of land is everywhere rapidly falling in consequence of the presumption in favour of minors being indiscriminately acted upon by all the courts.

Minors of course must be protected by the courts : but so also must honest buyers and mortgagees. And I think there can be no doubt that at present the interests of minors are very unduly preferred to those of alienees, particularly where the alienations have been made by the father of a family. Ordinarily, it seems to me, where a Hindū family including several male members, sons and grandsons, has the Father for its head, and numerous transactions are effected by the Father presumably with the knowledge and assent of sons and others who have attained their majority, a minor member should not be permitted to challenge any act that his seniors appear to have assented to, expressly or tacitly. And when the Father dies and is succeeded as manager by the eldest son, and "the others live under

him as they lived under the Father" (Manu), his acts ordinarily should be regarded with no more suspicion than they should, had they been done by the Father. As between two brothers, one of full age and one under age, the case may be very different. But even in such case I would, if possible, avoid all general presumptions, and decide upon the particular circumstances alone.

Principle IX. is: "That the widow of an undivided co-parcener, whether childless or not, has no title to anything but maintenance."

These are the words of the learned Judge who pronounced the short judgment of the Court in *Varadiperumal Udaiyan v. Ārdanāsi Udaiyan and others*, I. M. H. C. R., 412. Though the question before the Court was of prime importance, and counsel cited divers authorities, the Court declined to consider the matter, and based its decision on an isolated passage of the *Mitāvarā* (II. i., 8), which, so far as I can see, does not at all warrant the decision.

The passage as cited is merely this: "The rule deduced from the texts that the wife shall take the estate regards the widow of a separated brother," and the Court assumed (1.) that the author in stating this to be the opinion of *Dhāreṣwara* (King Bhoja) agreed with him; and (2.) that the author was of opinion that "a widow would not inherit when the deceased was undivided." But if the whole paragraph is carefully



perused, it will appear clearly, first that the explanation of *Dhāreṣwara* contains a most important limitation not noticed by the High Court; and secondly that so far from approving the explanation furnished by *Dhāreṣwara* the author of the *Mitāṅarā* enters upon a long argument for the express purpose of showing him to be wrong. The side-note to paragraph 15 (Colebrookes translation) is this:—“*Dhāreṣwara*’s argument (§ 8-14) refuted:” and that to the next paragraph is:—“His objections obviated:” and that to the next is:—“An inconsistency in his interpretation shown,” and that to the next is:—“His explanation of Gautamas’ text (§ 8) proved to be erroneous. The right interpretation of it stated. A chaste widow’s succession is expressly affirmed: and an appointment to raise up issue condemned:” and that to paragraph 22 is:—“*Dhāreṣwara*’s argument of women’s inaptness to inherit (§ 14) refuted. It is shown to be inconsistent with passages of *Yājñavalkya*, *Gautama* and *Manu*:” and that to the next is:—“And is incompatible with the reasoning of the *Mīmāṃsā*.” And having as he thinks sufficiently refuted *Dhāreṣwara* and other misguided persons, the author of the *Mitāṅarā* winds up the section with the following ‘conclusion,’ namely:—“Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue.” And consequently *Dhāreṣwara* must be held to be wrong in holding that she took



such estate "provided she were solicitous of authority for raising up issue to her husband," and not otherwise.

Thus the last Paragraph of the Section states the settled rule to be applied in favor of a childless widow of a separated co-parcener, Section VII. of the 1st Chapter having previously provided for ordinary widows in the following manner, namely:—"When a distribution is made during the life of the father, the participation of his wives, equally with his sons, has been directed. ("If he make the allotments equal, his wives must be rendered partakers of like portions.") The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father: "of heirs dividing after the death of the father, let the mother also take an equal share."

"Of heirs separating after the decease of the father, the mother shall take a share equal to that of a son; provided no separate property had been given to her. But, if any had been received by her, she is entitled to half a share, as will be explained."

And Paragraph 9 of Section II., Chapter I., also provides similarly for the wives of a father who separates his sons from him.

According to the *Mitāṅarā*, therefore, ordinarily: If A dies separated from his co-parceners, his childless widow takes his whole estate. If A separates



his sons from him, his wife takes a share equal to that of a son. And if A dies leaving a widow and sons, and the sons separate, the widow takes a share equal to that of a son.

The only case not directly provided for by the *Mitāvarā* seems to be that of a widow, whether of the Father or of one of the brothers, where the un-separated brothers do not separate after the death of the Father: and the question arises, can such widow demand allotment of a share, and if so, in what circumstances?

In the decision of the High Court case under notice it is declared by Frere, J., that "the authority of the *vyavasthā* is nothing as compared with that of the concurrent opinions of Sir Thomas and Mr. Justice Strange." Now when the opinion of the former authority is looked at*, it will be found to rest entirely on two paragraphs in Sec. 1, Chap. II. of the *Mitāvarā*, namely 20 and 31, which form part of the authors argument to refute *Dhār-eṣwara*, noticed above. And a note at the bottom of the page shows clearly that Sir T. Strange did not feel sure that his opinion was correct.

That note refers to the following admirable remarks of Mr. Ellis upon the answer of a Pundit to the effect that a widow was entitled to food and raiment, &c., at the hands of her husbands brothers, and to no more:—"This is *not* the law of the *Smṛtis*. It is the convenient law of more modern commen-

*Hindū law, Vol. I., p. 121.



tators, endeavoured to be supported by proposing alterations in the original texts, for which there is no foundation. In recent times, however, when the operation of the Hindū law had been interrupted, and none other established in its stead, the nefarious practice of the males of the family seizing all the property of it, and reducing the females to a state little short of slavery, came gradually to prevail: which practice, as appears throughout these papers, the present race of Pundits are sufficiently inclined to support."

"The correct doctrine is, that a widow succeeds to the "entire share" (*critsnam ansam*) of her husband immediately, if partition have taken place; eventually, if it have not. What then is the situation of a widow of a co-parcener during the time the family continue undivided? Is she merely entitled to a maintenance? No—she is in the situation of her deceased husband; and is entitled to the use of the joint property, to the full extent that he was entitled to it, remembering always that as a female, she is under the *protection* of her natural guardians."

And at p. 296 of the same volume will be found the remark of Colebrooke:—"The law provides, that when partition takes place the mother shall have an allotment made up to her, equal to a full share. There is no distinction in this respect among the different tribes."



Then at p. 231 of the same we have the answer of Kistnamachary that an estate, if separately acquired by one of two undivided brothers, would have descended to his widow exclusively.

And at p. 250 of the same there is the text of Manu translated by Sir William Jones:—"If the husband has been a co-heir, and died before partition, his brother, and the next in order, inherit his *undivided* share; but his wife takes all his *divided* property."

Sir T. Strange has not ventured to discuss at large the right and position of a widow, and of course Mr. Justice Stranges Manual does not contain much information about the matter. The opinion of the latter in disfavour of the widows right has been expressly overruled by the Privy Council in the "Sevagungah case,"—at IX. Moores I. A., 539,—who decided that a widow is entitled to take the self-acquired and separate property of her husband, though he died unseparated from his brethren. The decision was arrived at upon a careful consideration of numberless authorities, particularly 3 Dig., 458, Tit. ccxcix., and Sir William Jones' paper cited at II. Strange, 250. And it must be taken to overrule the Madras case under notice.

Sir Henry Sumner Maine says at p. 325 of his 'Early History of Institutions:' "There are in fact clear indications of a sustained general effort on the part of the Brahminical writers on mixed law and religion, to limit the privileges of women which they



seem to have found recognized by older authorities." And he seems to think that *Strīdhana* and other ancient privileges of women have constantly been encroached upon and greatly curtailed by the Brahmans, through hostility on their part to the "proprietary enfranchisement of women." The hypothesis is put forward in an attractive manner, but unfortunately the Digests, to which alone we must look for "clear indications" of this hostility and this effort, contain, so Doctor Burnell tells me, nothing of the kind. Different views of the question of the nature and extent of *Strīdhana* have been taken, it appears, in consequence of it being impossible authoritatively to settle the question whether *Strīdhana* is an ordinary compound, denoting womans wealth, or a term of art. One group of writers say that it is the former, and that therefore there is no limit to its meaning, and, as appears from the *Mitākārā*, Chap. II., Sec. 11, it may include any property a woman may get into possession; and if the texts mention particular kinds, it is only by way of example. Another group of writers say *Strīdhana* is a term of art, since if it were not, the texts would not mention particular kinds of it, and therefore it is limited to what is mentioned in the texts, and must be construed accordingly. Thus according to the principles of Hindū exegesis both a broad view and a restricted view of the nature and extent of *Strīdhana* are tenable. Either view may be right, and those lawyers who choose to take the restricted view, do



so quite reasonably and properly, and to attribute their choice to hostility to women is illogical and wrong. Sir Henry Sumner Maines popular writings have done so much for the good cause, by which I mean the cause of those who desire to see Hindū law expounded in a rational and proper manner, that one cannot but be reluctant to point out errors of which he may have been guilty. But he would seem hitherto to have been unconscious of the vast difference that exists between the Hindū text-books and the commentators' digests that seek to reduce them to logical consistency. Thus he speaks of the *Mitāṣarā*, at p. 321 ubi supra, as being "one of the oldest of the Hindū juridical treatises," whereas it is of the 11th or 12th century only.

In conclusion I will observe that it appears to be settled law in Bengal that the widow of a coparcener who leaves no male issue is entitled to his share of the joint property, as provided by the *Dāyabhāga*, Ch. XI., Sec. 1, the doctrine of which is deduced from various texts including one of *Yājñavalkya* (2,136-7). That text is said to "propound the succession of the widow in preference to all the others," in default of male issue, and is the very text commented on in the *Mitāṣarā* in Chap. II. Sec. 1. An attempt to make the *Dāyabhāga* and *Mitāṣarā* agree as to the widow's right would, I imagine, be not very difficult.

Principle X. is :—"That ancient *Zemindaries* are



not divisible, because they are “*of the nature of principalities.*”

In *G. N. D. Maharajulungaru v. V. Rajah Row Puntulu*, V. M. H. C. R., 31, the Court declared : “The established rule which takes ancient Zemindaries out of the general law of partition and succession is, we think, strictly limited to the corpus of the land and other immovable property forming the estate of the Zemindary, and such movable property as by customary descent may have become an heritage appurtenant thereto. The exemption arose as Sir Thomas Strange observes in his *Treatise on Hindū Law*, Vol. 1, p. 198, and as is recognized in the judgment in *Gunesh Dutt Sing v. Maharaja Mohashun Sing*, 6th *Moore's I. A.*, 189, from the nature of the estate. When from being, as they seem originally to have been, managers of the revenue of sovereign states Zemindars assumed the rights of proprietors and some of the powers of independent ruling princes and chiefs over extensive tracts of country, those tracts, forming their Zemindaries, came to be enjoyed as regalities or principalities, and usage at length obtaining the force of law, such Zemindaries were by analogy brought within the special rule which exempted the power and property of sovereign princes from the general law of succession and partition. In its very inception then the exemption appears to have related strictly to the property constituting each ancestral Zemindary estate.”



It is quite clear that the "*established rule*" was taken bodily from Sir T. Stranges work, and a reference thereto shows how the authors idea was formed. Sir T. Strange seems to have found a text of Manu (ix., 323) which speaks of a dying king "having duly committed his kingdom to his son," and forthwith deduced from it that: "To this descendibility of estates, by the Hindū Law, to all the sons in common there appears to have been ever, in point of fact, an exception in the case of the crown; as it is with us, at this day, where there are only females to inherit." He admits however that Jagannātha "refers this course to usage rather than to law." And then he goes on to say: "Upon the same principle of usage, stands, with respect to many of the great Zemindaries of Bengal, and other parts of India, at this day, the exclusive succession of the eldest son." The only scrap of authority for this last sweeping statement appears to have been the decisions or supposed decisions in two Bengal cases.

Now: first with regard to the text of Manu, and Jagannāthas opinion of it. The inquirer will find that at II. Dig., pp. 414—20, Jagannātha has entered upon an elaborate argument for the purpose of routing and putting to shame any who might be disposed to aver that the dominions of a king are not divisible amongst his sons like the estate of an ordinary house-holder. He says expressly that: "The Sages have not inserted kingdoms under the title of indivisible property," and that the special custom



“among all the sons of *Ishwācu*, the first born is king,” was not to be followed by the degenerate men of these times, who if they wanted an ancient precedent, might remember that: “Satrugghna divided and gave to his sons the kingdom which he acquired in the forest of *Madhu*.” It may safely be assumed, therefore, for the present that there is nothing in the *Vēdas* and *Smṛtis* to show that a kingdom is not partible like other estates.

From the Hindū point of view there would seem to be no objection to following the general rule of partibility in the case of a kingdom. And in the case given at II. Strange, 328, the Pundit made answer that “Though, by law, the kingdom might have been divided, yet in their prudence” the course of entailing the crown (sic!) upon the eldest son was preferred, “it being thought, that if it was given to all, strife would ensue. Therefore, and as prudence prevails often against law, a kingdom is not divisible; it is so settled in many countries.” Of course the Pundit does not name those countries, and is speaking very loosely of what he knew by hearsay. Upon this answer Mr. Ellis remarked: “This latter” (the enjoyment of sovereign power) “cannot be divided; for division would destroy it; and it is a maxim, that nothing shall be divided which would be destroyed by the act.” This, however, appears to me to be pure European reasoning. The inhabitants of South India have never formed a nation, and



never known the exercise of sovereign power by a great king or potentate, and certainly it would never occur to the mind of one of them to liken the division of a kingdom to the breaking of a vase or the partition of a garment.

If however it be conceded that as a fact in certain unknown parts of there obtained during an unknown space of time a custom of not dividing the kingdom amongst the sons of a deceased king, it does not at all follow that the former existence of that custom should be permitted in any way to influence the courts now in deciding the question of the partibility of a given *Zamīndāri*. Jagannātha seems to have hinted pretty plainly that in his opinion the great Bengal *Zamīndārs* of his time ought not to presume to claim to be dealt with like the Hindū Kings of old (vide II. Dig., 420), and if he was right in so thinking, a fortiori the petty *Zamīndārs* now to be found in the Madras Province ought not.

It is difficult to understand what Mr. Justice Strange meant by the words used in § 274 of his Manual to denote certain kinds of property not partible, "Regalities and ancient Zemindaries which have vested in the eldest son." The words look simple enough at the first blush, but when one begins to try to get at their actual meaning, difficulties spring up on every side. I suppose that by 'regalities' is meant the dominions not the qualities of kings, and by *ancient Zemindaries* is meant those *Zemindaries* that have existed as such during at least two or three cen-



turies. But where within the territorial limits of the Madras Province is any '*regality*' or any such *Zamīndāri* to be found? As I have shown in the "*Madura Manual*," there were no *Zamīndārs* in the extreme south of the Peninsula until the East India Company seized the country at the end of the last century, and converted the representatives of the *Sētopatis* of Ramnad and of various Poligars and chieftains into simple land-holders, and styled them '*Zamīndārs*' in accordance with the then prevailing policy. It is possible that some few of the existing *Zamīndāris* of Kurnool and other Telugu countries may be genuine Muhammedan creations of ancient dates. Whether this is or is not so, I have not the means of learning. But I can confidently assert that as a rule, and with no exceptions that I know of, the *Zamīndāris* of the Tamil countries have existed only since the assumption of those countries by the British.

Without going into the hopeless question of the modern rights and duties of *Zamīndārs*, it will be well to explain here briefly what the term implies. It is not doubted, I believe, that the word means simply land-holder; and that before the British power began to wax great, the *Zamīndār* was regarded merely as the collector of revenues due to the Government by a given tract of country, and as such removable from his office at the pleasure of the Government, and practically was removed whenever the local Government of the *Sultān* or



Sūbahdār or Nizam desired and was strong enough to remove him. The term is not Hindū and never was used by Hindū Governments, at all events in the extreme South of India: the term is Muhammedan, and the use of it always implied established Muhammedan domination. After the British power began to wax great, and when the first efforts were made to settle the Southern Districts upon an orderly and reasonable plan, many *Zamīndārs* were created of a kind till then unknown, that is to say "*land-holders*" who were to be co-proprietors or co-tenants with the actual cultivators of the soil, and in theory at least powerless to injure or wrongfully coerce them. The difference between the *Zamīndār* of the present day and the *Zamīndār* of a century ago is inconceivably great. The latter never in any respect resembled an independent sovereign: the former as a rule very closely resembles a very ignorant and helpless country gentleman possessed of a more or less extensive landed estate.

If this last proposition is true, and I do not think it is likely to be disputed, what legal objection can be raised against the dividing a *Zamīndār's* estate amongst his sons, when he dies, like an ordinary estate of a Hindū house-holder? I know of none. When the rights of the new *Zamīndār's* were settled by the Madras Regulations of the year 1802, it was expressly declared and enacted by Section VIII. of Regulation XXV. that the *Zamīndār's* shall "be at free liberty to transfer, without the



previous consent of the Government, or of any other authority, to whomsoever they may think proper, by sale, gift, or otherwise their proprietary right in the whole or any part of their Zemindaries; such transfers shall be valid, and shall be respected by the Courts of Judicature and by the Officers of Government; provided they shall not be repugnant to the Mahomedan or to the Hindū laws, or to the Regulations of the British Government." This being so, it is difficult to understand upon what principle a *Zamīndāri*, whether deemed to be ancient or modern, can be held to be impartible. The Madras Government, in creating, defining and limiting the right of the *Zamīndār*, expressly gave him power to break up his estate; having already declared, by Section II. of the same enactment, that his right over the soil "shall become vested in him and in his heirs and lawful successors for ever." These, according to the Sanskrit law-books, in the case of a Hindū ordinarily are his sons and grandsons. And why the sons of a deceased Hindū *Zamīndār* of the Madras Province should not be allowed to divide his estate amongst them and promote *dharma*, I am wholly unable to understand.

In *Naragunty Lutchmeedavamah* and *Vengama Naidoo*, IX. M. I. A., 66, it was declared, apparently upon a perusal of an article in Wilsons *Glossary of Indian terms* and of a Select Committee Report, that "A *Polliam* is in the nature of a *Raj*. It may belong to an undivided family, but it is not the subject



of partition, it can be held by only one member of the family at a time, who is styled the Poligar, the other members of the family being entitled to a maintenance or allowance out of the estate." The "*Madura Manual*" shows, however, that the Poligars of the extreme South of India were as a body very petty chieftains, from the time they were created in the 16th century until Hyder Ali reduced them to subjection, and the British Government put an end to them, towards the end of the last century: and whilst the Rajah of Travancore and the *Sētupati* of Ramnad and others only did homage to the *Nāyakka* Lord of Madura and Trichinopoly, the Poligars paid him annual tribute. They were in fact mere heads of clans, permitted to levy taxes from the inhabitants of tracts of land on condition of keeping up a militia for the use of the *Nāyakkan* and paying into his treasury what was supposed to be one-third of their collections. It is written that seventy-two Poligars were created in the first instance, one for the protection of each of the bastions of the Fort of Madura, and this may be true. But probably in the course of a century there were scores of them to be found in many parts of the Madras Province. The following extract from a letter of the Jesuit Father Vico, dated Madura, 30th August, 1611, and to be found in the "*Mission du Maduré*,"* explains with great clearness the subordination of the Poligars to the *Nāyakkan* of Madura, who was himself subordinate and tributary to the

* *Par Le P. J. Bertrand, Paris, 1847.*



Vijayanagara King or Emperor. It runs thus:—

“Lé roi ou grand Nayaker de Maduré n’a que peu de domaines qui dépendent immédiatement de lui, c’est à dire qui soient sa propriété (car dans ce pays les grands sont seuls propriétaires et les autres sont les domaines d’une foule de petits princes ou seigneurs tributaires; ces derniers ont, chacun dans leur domaine, la pleine administration de la police et de la justice, si toutefois justice il y a; ils lèvent les contributions, qui comprennent au moins la moitié du produit des terres; ils en font trois parts, dont la première est réservée comme tribut au grand Nayaker, la seconde est employée à soudoyer les troupes que le seigneur doit lui fournir en cas de guerre, la troisième appartient au seigneur. Le grand Nayaker de Maduré, ainsi que ceux de Tanjaour et de Gingi, sont eux-mêmes tributaires du Bisnagar, à qui ils paient ou doivent payer chacun un tribut annuel de six à dix millions de francs. Mais ils ne sont pas exacts à s’en acquitter, souvent ils diffèrent, quelquefois même ils refusent avec insolence; alors le Bisnagar arrive ou envoie un de ses généraux, à la tête de cent mille hommes pour se faire payer tous les arriérés avec les intérêts, et dans ces cas, qui sont fréquents, c’est encore le pauvre peuple qui expie la faute de ses princes; tout le pays est dévasté, et les populations sont pillées ou massacrées.”

It is impossible it seems to me for any one who knows anything of the history of the extreme South of India to contend seriously that the Poligars, or



any of them, were at any time Sovereign Princes in any sense of the term, or in the least degree resembled Sovereign Princes. In fact it is doubtful whether many of them were more than Headmen of single villages. Whatever they may have been, it is recorded (vide the "*Madura Manual*") that they were obliged when they came before the *Madura Dalavāy* to pay their respects to him, to prostrate themselves at full length in a mud-bath prepared for the purpose.

I will now quote what Doctor Burnell has written* about the *Zamīndārs*:—"Sir T. Munro (v. Gleigs Life, p. 322) appears to have been the first person of authority who suggested that the Zemindaries of S. India were not governed by Hindū Law. Actually as far as the Zemindars are concerned, there can be little doubt that but few have any pretence to belong to castes recognized by the *Dharmaśāstra*, and many are certainly the recently Hinduized Chiefs of half savage hill tribes (cfr. Hislop's "Papers ed. by Sir R. Temple, pp. iii., 5 and 12). Many however claim from the time of Muhammedan rule and still use Muhammedan titles (e. g. Mansabdar); that the Muhammedans however held the doctrine now current regarding Zemindaries, it is impossible to imagine. Bernier says of the Rajputs who held land under Muhammedans in N. India in this manner (i., p. 44):—"They might be said to form a species of pagan nobility, if the land were inalienable and descended to their children."

* *Varadarājas Vyavahārānirṇaya*, Preface, viii.



Baillie ("land tax of India," p. xxxix.) has shown how the Zemindaries of N. India were formed; they were divisible except in a very few cases. See also "Selections from the Records of the Bombay Government" new series xxxviii., which clearly shows that under the Mahrathas the sanction of the state was always necessary to succession to property held from the state, so Zemindaries could never have been recognized as partaking of the nature of principalities."

In conclusion I must observe upon Mr. Justice Stranges expression "which have vested in the eldest son." The learned author would seem to have overlooked that things may vest in a person in different capacities. Upon the death of the Father the younger brethren may elect not to divide but to dwell together in dependence upon the eldest, as if he were the Father; and where this is done, an English lawyer may erroneously suppose the estate to have vested in the eldest son as *his own*. As to this Professor Goldstücker has observed: * "The *Vyavahāra Mādhavīya* and especially the *Smṛti Chandrikā*, very distinctly regulate the succession of rights in an undivided family: it results from them that only a male member of such a family can be heir, and that *so long as the family remains undivided*, the whole of the property, whether ancestral or self-acquired, is vested in him." I cannot upon any hypothesis account for the extraordinary doctrine laid down in *Subbāluvammāl v. Ammākutti Ammāl*, II. M. H. C. R., 128, that:—

* "On the deficiencies in the Present Administration of Hindū law," p. 18.



“The *Zemindar* has really an estate analogous to an estate tail, as it originally stood upon the statute *De Donis*.” And this though the Government that created him, expressly said the *Zamīndārs* estate should go to his lawful heirs and successors, and he might aliene it or part of it as he pleased !

Principle No. XI is:—“That one with whose mother the adopter could not legally have married, must not be adopted.”

This fanciful doctrine, taken from Sutherlands Synopsis, p. 214, was received without question by Sir T. Strange (I. H. L., 83 :) handed on; though doubtingly, by Mr. Justice Strange (Manual, H. L., § 88—97 : and formally established by the Madras High Court in *Narasammāl v. Balarāmāchārlu*, I. M. H. C. R., 420. See pp. 31—2, above.

I have no intention of entering here upon an argument for the purpose of proving what probably might very easily be proved, that certain Sanskrit works do not, as alleged, contain anything that may properly be deemed to prohibit and make illegal the adoption of a sisters son, a daughters son, a brother and others : I will content myself with suggesting that those Sanskrit works probably have not at any time been accepted as works of authority by any persons resident in the Madras Province, and have not served, or have not served in an appreciable degree, to guide public opinion as to what ought to be done and what ought not to be done in the matter of adoption.



Judging from my own experience, I do not believe that the people at large, including our Brahmans, have any the slightest knowledge of the existence of the doctrine under notice : and on the other hand I do believe that as a general rule those tribes and castes of the Madras Province who practise adoption at all, adopt indifferently whatever youthful persons can most conveniently be procured for the purpose. Only the other day a very respectable official belonging to one of the leading Brahman clans of the South of India told me that a member of his family had adopted a brother. And several persons who should know, have told me that a daughters son is commonly, and a sisters son most commonly, taken in adoption.

In *Jivani Bhai v. Jivu Bhai*, II. M. H. C. R., 462, it was declared at the end of the judgment:—
“On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of opinion among the Pundits, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid. It will perhaps be found that the allegation of custom in this case will be found to amount simply to an allegation that people do that which the law has forbidden.”

If the authorities are all one way, how comes it that the Pundits could not agree upon the point? Does it not seem to be almost certain that whilst some of the Pundits resolved at all hazards to sup-



port the so-called authorities, by a knowledge of which they got their daily bread, others had not the courage to ignore and deny the fact of the universal prevalence of a usage diametrically opposed to the authorities ?

At p. 165, II. Strange, will be found a very instructive passage in a paper by Ellis, that wise scholar and observer, untimely cut off. It runs as follows, namely:—"There are some prohibitions, that relate to acts from which neither breach of morality, nor even irregularity, as regards ceremonial rites, can be inferred ; and these, by common consent, are not considered imperative. The cases usually cited are,"—

"The immolation of the victim, and the preparation of its flesh by Brahmins."

"Sale of the Soma vine by Brahmins."

"Performance of pilgrimage to distant places by a house-holder."

"Intermarriage with the daughter of a maternal uncle."

"These are all prohibited ; yet, notwithstanding the two former are known to be generally practised, the third is thought to be meritorious : and with respect to marriage with the daughter of the maternal uncle, so contrary is the practice to the precept, that the intermarriage with such a relation, if she exist, is considered incumbent."

I do not know whether Ellis was warranted in saying that intermarriage with the daughter of the



maternal uncle is "considered incumbent," but natives have told me, and I believe truly, that such intermarriage is of universal prevalence for the following all-sufficient reason: If a man marries the daughter of his mother's brother, his wife will naturally be disposed to yield a thorough and complete obedience to her mother-in-law's rule, and there will be no quarrelling in the house.

At p. 162, II. Strange, an extract from a letter from Ellis contains the following most instructive passage, the truth of which cannot, I think, be doubted, namely:—"The Brahmins, in introducing into this part of India, their laws and religion, were obliged in many things, to conform to the opinion of the aboriginal inhabitants, though in many instances immediately opposed to their prejudices; hence the Sudra high priests, in most of the *Siva* Pagodas on this coast, the indiscriminate female intercourse, and succession in the female line in Malabar, the primogeniture succession to landed estates among the *Velmarvon*, and other northern tribes, the exclusion of widows from succession even among the Brahmins; &c.: the truth being, that the law of the *Smritis*, unless under various modifications, has never been the law of the Tamil, and cognate nations."

With statements like these before it, I would humbly ask whether the local Government is justified in continuing any longer to permit a fanciful doctrine like that under notice to be acted upon by all the courts of the country, without first satisfying itself by



a sufficient inquiry whether in fact the so-called Hindū inhabitants of the Madras Province do profess, or have at any time professed, to guide themselves by rules of conduct contained, or supposed to be contained, in treatises such as the *Dattaka Mīmāṃsā*, *Dattaka Chandrikā* and others on adoption. It must be remembered that every day respectable persons who do not know what goes on in the High Court are adopting the sons of women whom they could not legally marry, and in the course of time, unless a remedy is early applied, many of the adoptions made by them will be set aside. Before the end of this century how many thousands of families may not be plunged into misery by a fanciful and absurd prohibition of adoptions of kinds that recommend themselves to common sense and natural feeling?

The *Dattaka Chandrikā* appears to have been accepted by the "*Madras School of Hindū Law*" because in his preface to his two treatises on adoption Sutherland quotes Colebrookes hearsay about the authority of the *Smṛti Chandrikā* in the South of India, and then observes: "It is not unlikely, that the *Dattaka Chandrikā* may have attained equal distinction." What the authority of the *Dattaka Mīmāṃsā* in South India rests upon, I have not been able to discover. It appears, however, that Colebrooke made use of it for the purpose of illustrating a part of the *Mitāvarā*, and this circumstance may have sufficed to make Sir T. Strange believe that adoptions were ordinarily made in every part of South India



with reference to precepts contained in the *Dattaka Mīmāṃsā*.

Principle No. XII is:—"That the *Āliyasantānada Kattu Kattale* is a work of authority on the law of South Kannada."

What is quaintly styled the "*Alya Sullana system of Canara*" has always been supposed by the Madras High Court to have been authoritatively expounded in a work known as "*Bhutala Pandeyā*." And thus in the case *Munda Chitty v. Tirumajee Hensu*, at 1 M. H. C. R., 380, the Court observed that its conclusion "was strengthened by the fact that *Bhutala Pandeya* is silent on the subject of residence after marriage." And in the case of *Suben Hegada v. Tangu*, 4 M. H. C. R., 196, the Court said: "The rule of the law derivable from the recognized work of authority *Bhutala Pandeya*, (which we regret to find is still untranslated into English,) and decided cases we take to be &c., &c."

Any one reading these observations might suppose that this "*recognized work of authority*" has been for Kannada from time immemorial nearly what the *Mitākṣarā* is supposed to have been for South India generally, that is to say a work of undoubted authenticity and authority, constantly and lovingly referred to by all who have disputes to settle. But Doctor Burnell has told us that the work is an impudent and quite recent fabrication, of which the authorship has been satisfactorily traced. This being so, one cannot refrain from wondering upon what sure foundations rests the unwavering belief of the Madras



High Court that the *Mitāṅarā* is the paramount authority in this part of India. Can it be that that greatly revered treatise, which after all only professes to be a commentary on a work that professes to have been composed for the instruction and edification of some philosophers assembled together at Maithilā*, has been unhesitatingly accepted by the Madras High Court as the law of the Madras Province simply and solely because Colebrooke once took a great fancy to it and printed a translation of it at Calcutta in 1810! Judging from the preface to his translations of the two treatises on inheritance, it would seem to be not improbable that Colebrooke inferred that the *Mitāṅarā* was "received in the school of Hindū law" of the extreme South of India from what he rashly supposed to be a fact, namely that the *Smṛti Chandrikā* of *Devanna Bhaṭṭa*, which is based wholly on the *Mitāṅarā*,—"Is of great and almost paramount authority in the countries occupied by the Hindū nations of *Drāvira Tailinga* and *Karnāta*, inhabiting the greatest part of the Peninsula or Dekhin." As has been shown before in Chapter I., there never have been any such nations, and Colebrooke admits that he learnt this supposed fact from others. Now, who were those others, and what were their means of knowledge? Of *Devanna Bhaṭṭa*, Sir T. Strange tells us in his preface that:—"Little, if anything, seems to be known. The work, attributed to him, was compiled during the existence of the *Vidyanagara* dominion (an extensive Southern

* See the Preface to Colebrookes 'Digest', p. xvi.



Empire that flourished during the 13th, 14th and 15th centuries of our era); but apparently not under the direct sanction of the Government. *It has been considered by Mr Colebrooke to be a work of uncommon excellence.*" I have put these words in italics because it seems to me to be probable or at all events possible that they furnish a key to the whole question as to the origin of what is called the Hindū law of the Madras Province. Colebrooke, a great scholar, admired the *Smṛti Chandrikā*, probably because he found it contained more of common sense and less of *Mīmāṃsā* dissertation than most Sanskrit commentaries on legal works, and easily believed that it was "of great and almost paramount authority" in the South of India. Having come to know of this belief, and that the *Smṛti Chandrikā* closely followed the *Mitākārā*, and having Colebrookes translation of the *Mitākārā* ready to hand, what could be more simple and natural for Sir T. Strange and others than to take for granted that the *Mitākārā* was the real, original work to which all the Madras tribes and castes should, *and therefore did*, look for their law of inheritance and succession?

The following passage from Doctor Burnells Preface to *Varadarājas Vyavahāranirṇaya*, p. xii, n., shows how extremely careful we ought to be in scrutinizing authorities and accepting current beliefs about the genuineness and validity of our so-called Hindū Law books. He writes thus: "I know of instances in which I am confident forged extracts



have been presented to Courts of Justice. One patent imposture yet accepted by the Courts as evidence is the *Āliyasantānada Kaṭṭu Kaṭṭale* a falsified account of the customs of S. Canara. Silly as many Indian books are, a more childish or foolish tract it would be impossible to discover; it is as about as much worthy of notice in a Law Court as "Jack the giant killer." That it is a recent forgery is certain for the following reasons: It professes to record events beginning with the year 1 of the *Qālīvāhana* era i. e. A. D. 78-9, and it is evidently intended that it should be thought to have been compiled at that time, but the very first 5 lines show that when this was written, the Vijayanagara kingdom was the subject of romance and must have been long extinct, it is therefore later than the end of the 16th century (when the Vijayanagara kingdom fell) by a considerable time. The word *Pāndeya* seems to be a dim recollection of some of the Jain chiefs who ruled in parts of S. Canara in the 15th and 16th centuries, one of whom was called *Pandyaarāja*. In the text we find pure Hindustani words which can only have been introduced in the last century; e. g. *Sāhukār Bārak* (twelve) in the absurd etymology of the name *Bārākūr*. But the origin of the book in its present state is well known: it is satisfactorily traced to two notorious forgers and scoundrels about 30 years ago, and all copies have been made from the one they produced. I have inquired in vain for an old M.S. and am in-



formed on the best authority that not one exists. A number of recent MSS. are to be found, but they all differ essentially one from another. A more clumsy imposture it would be hard to find, but it has proved a michievous one in S. Canara, and threatens to render a large amount of property quite valueless. The forgers knew the people they had to deal with, the *Bants*, and by inserting a curse that families which do not follow the *Āliyasantāna* shall become extinct, have effectually prevented an application for legislative interference though the poor superstitious folk would willingly (it is said) have the custom abolished. However both this system and the closely allied *Marumakkattāyam* in Malabar are primitive customs, and it is of course absurd to assign an origin for them in historical times as e. g. the *Anācāranirṇaya* ascribes the last to Ṣan-karaçarya. Cfr. *Lubbocks* "Origin of civilization" P. P. 69, 100 and 101."

Principle No XIII. is:—"That '*survivorship*' is a principle upon which the rule of succession in part depends."

To one of Nortons' Leading Cases, at I., p. 457, the second head-note is: "Succession, in undivided families living under the *Mitacshara*, goes by survivorship to the males, to the exclusion of females." And at p. 461 the learned author explains: "There is attached to this co-parcenary the incident of *benefit of survivorship*, which in English law is one of the main distinctions between *joint-tenancy* and co-par-



cenery. The leading case, well known as the *Oor-
cand case*, illustrates the doctrine." And again at
p. 488 the learned author declares that in divided fa-
milies one of the principles on which all successions
depend, is survivorship.

In the well known *Sivaganga case*, IX. M. I. A.,
610, the Privy Council declared that: "There are
two principles on which the rule of succession, accord-
ing to the Hindū law, appears to depend: the first is
that which determines the right to offer the funeral
oblation, and the degree in which the person making
the offering is supposed to minister to the "spiritual
benefit of the deceased; the other is an assumed right
of survivorship."

Professor Goldstücker's 'Paper' shows, pp. 19 et seq.,
that this second principle "does not exist at all," and
their Lordships wrongly laid down the law because
they had not proper authorities to consult.

Doctor Burnell* alludes to this same decision, and
says the doctrine is "entirely foreign to Hindū law,
and alone sufficient to render the administration of
this Law nearly impossible, for it confounds co-
parcenership with the state of division. The distinc-
tion between these two conditions is a vital one to
Hindū Law, and practically it is impossible to over-
rate its importance."

Principle No. XIV. is:—"A widow can adopt a
son without the consent of her husband according to
Hindū law."

* *Varadarājus Vyavahāranirṇaya*, Preface, vii.



This unqualified and most alarming doctrine was established by the very elaborate and ornate judgment of the High Court in the Ramnad Case, reported at II. M. H. C. R., 206. It were as tedious as profitless for me to go over the wide space of ground covered by the arguments of the learned judge who delivered that judgment, though it would be easy to show, what he in fact admitted, that really he had not the authorities on his side. I shall content myself with suggesting a few reasons for holding that ordinarily a widow may not of her own mere motion add to her husband's line a son that her husband during his lifetime did not want and perhaps would have strongly disliked. Common-sense would seem to be outraged by the proposition that when a man is dead and unable to protect himself, his widow, whom possibly he hated with a lively hatred, has power at any time to procure a stranger to be made his son and as such to succeed to his whole estate, and it appears to me that there is nothing in the Sanskrit treatises usually referred to that can properly be held to support so singular a proposition. The Privy Council, on appeal, were rather inclined to make fun of the reasons upon which the above Madras judgment was based, and found the adoption to be good because sanctioned by the custom of the country in which it was made. See Moores I. A., Vol. IX.

I believe it is generally agreed that the object with which a Hindū formally adopts a child, is to



get for himself a substitute for a natural son who may deliver his soul from the Hell called "*Put*" by duly performing certain obsequial rites. But this delivery of the soul, I am informed, can be effected only during the space of time that elapses between the eleventh day next after the death and the last day of the first year after the same: and if this is so, then, according to Hindū notions, an adoption would in any case be useless to a deceased person, if performed in his behalf after the lapse of the first year after his death, and being useless would therefore be improper and invalid.

Unless a time is fixed within which a widow may adopt to her deceased husband, the following anomalous and preposterous state of things may occur: a woman left a widow at the age of ten or twelve may enjoy her deceased husband's property for sixty years or more, and then on her death-bed gratify her long cherished spite against the persons who expect to succeed, by suddenly adopting with the, possibly purchased, consent of a single *Sapiṇḍa*!

It seems perfectly clear that some time must be fixed within which so important a step as creating a son for a deceased husband may be taken by the widow: if so, what should the time be? To me it seems only reasonable that the time should be limited with reference to the obsequial rites to be performed after the cremation of the corpse, and commonly styled the *middle* rites. If these rites are performed



without the assistance of an adopted son, a subsequent adoption would be useless and therefore improper.

The following clearly worded and instructive extract from an opinion of the Pundit T. Kistnama Charriar, to be found at II. Strange, pp. 87-8, appears to me to furnish a sufficient solution of the whole question:—"When a boy is to be adopted, the adopter should invite the relations of either party, and entertain them at his house, giving notice to the king (or principal authority of the place) of his intention; and then the husband and wife, waiting upon the parents of the boy, and stating that they have no son of their own, should ascertain if they are willing to give them one of theirs;—to which they assenting, the *Datta homam* must be performed. After adoption, the *upanayana*, and the marriage of the adopted are to be celebrated by the adopter, the same as for a natural son; and all rites are to be performed in the *gotra* of the adopter, not of the adopted. The same ceremonies, with the exception of *homams*, are to be observed in the other castes. The water called *Manjenum* should be drunk in the presence of relations. The death of the husband approaching, so as not to leave time for the ceremony on his part, the widow, with his permission, may adopt. In either case, the adopted succeeds to the estate of his adoptive father, subject to his debts, and to the obligation of maintaining the widow."

According to the view of this Pundit a widow may adopt with the permission of her husband: Provided



- (1) that the husband's death came on so rapidly as to prevent him performing the adoption for himself, and
- (2) that the husband himself gave his wife permission to adopt him.

It may often happen that a man shortly about to die and anxious to adopt may be unable to get a child given to him before he dies, because his relatives live at a great distance from him. And it was in a case of this sort that a dying man granted to his wife the power given at II. Strange, 97. The following extract from it is highly instructive:—"It was my wish to adopt a child myself; but at present there is none at hand. To send for one would be attended with delay, which I should have no hopes of outliving. I therefore, of my own free will, permit you to adopt a son. After my death, whenever you may meet with a child, you may adopt him in my name. So that the daily offerings for the salvation of our souls may be duly performed, and our possessions and dignities perpetuated.....If you fail herein, the sin of neglecting my salvation will be upon you. I have granted you this license, and am hereby exonerated."

At II. Strange, 92, is an answer of a Pundit to the question: "Upon the death of a Brahmin, without issue, can his widow adopt?" He answered: "She may, having her husband's authority;—otherwise not." Upon this Colebrooke remarked: "The answer is according to the doctrine of the Bengal school; but the followers of the Mitacshara, in the Benares and Maha-



rashtra schools, admit the widows power of adoption, without authority from her husband, if she have the sanction of his kindred. See Notes to the *Mitacshara* on inh. Ch. i. Sec. xi. 9." This reference is to notes appended to a text that seems to contemplate a son being *given* by a mother *with* her husbands consent; and so far as appears there is nothing in the *Mitāṣarā* or any other accepted text-book going to show that a son may be *taken* by a widow as for her husband *without* her husbands consent. On the other hand there is the express declaration of *Nanda Pandita* in the *Dattaka Mīmāṃsā*, Sec. 1, 18, that a widow may not adopt with the assent of the kinsmen. And the *Dattaka Chandrikā*, Sec. 1, 7, shows that, as *Vasishtha* had declared, women may adopt with the sanction of their husbands. And also it appears from these notes that: "writers of the Gaura school, on the contrary, insist on a formal permission from the husband declared in his lifetime;" whilst "*Vāchespati Miśra*, who is followed by the Maithila school, maintains, that a woman cannot adopt a *Dattaka* or given son."

Sutherland with these notes before him came to this conclusion in his Synopsis of the Law of Adoption, Head First, namely:—"It is reasonable to admit, consistent with practice, and the opinions of other authors, the validity of an adoption made by a widow under the sanction of her husband written or formally expressed during his lifetime, and perhaps in some places under that of kinsmen." The Italics are mine. I have used them to mark



the cautiousness with which Sutherland thought proper to approve Colebrookes views.

In a case at II. Strange, 95, we have a valuable opinion of Ellis. The question was: Could a widow be authorised by her dying son to adopt another in his place? He observed:—"That the son, standing, to his widowed mother, as regards general protection, and the regulation of her will, in the place of her father, has, under the law, prescribing the consent of the husband as necessary to authorise adoption by her, a competency to invest her with such power, —this is impossible: but nowhere, in any *sastram* is it stated, that the consent of the son is necessary to legalize adoption by his mother." Again at II. Strange, 111, Ellis says:—"Certainly a Brahman woman cannot adopt without the consent of the husband, obtained before his decease."

Looking to what these mighty men of old have said, and to what the text-books seem to contain, and taking a common-sense view of the question, I think it would be reasonable and safe to hold that:—

(1.) The only proper person to take a child given in adoption is the householder who has no male issue.

(2.) Such householder should adopt a proper person, publicly, if possible, in the presence of his wife, kinsmen, *sapindas*, Brahmans and the magistrate.



(3.) Where the householder who intends to adopt is sick, and feels death to be approaching too rapidly to admit of his getting through the business himself, he may formally authorise his wife to do the proposed act for him.

(4.) When the householder manifestly resolves and prepares to adopt, but dies before the adoption is made, and without having formally authorised his wife to adopt for him, in such case the *sapindas* being assembled together, either for the adoption or for the funeral, may take it upon themselves then and there to supply to the widow the authority which but for his sudden death they believed the householder would himself have conferred on her.

By holding this to be the proper usage of the country as amongst Hindūs, we may, it seems to me, bring all the supposed conflicting ideas into harmony, and establish a state of things far less open to objection than that at present obtaining.

The adoption I have been speaking of is that of a child to and for the householder solely, or to and for him and his wife jointly. It is quite possible, however, that the Hindū law, as understood by Hindūs, contemplates and sanctions the adoption of a child by a widow to and for herself solely, for the performance of her *Sapindikarana* and for succession to her own property. As to this see Sutherland's interesting notice of the custom of Maithila, of widows adopting *Kritrima* sons, in his Synopsis of



the Law of Adoption, note v. Judging from my own experience I believe that such adoptions are made by widows in the South of India. The matter certainly needs to be looked into.

Principle XV. is :—"A Hindū family may be at one and the same time divided and undivided."

In *Timmi Reddi v. Achamma*, II. M. H. C. R., 325, it was successfully contended that a certain widow left by one who died separated from his brethren "had no claim whatever to the property which was actually undivided at the death of deceased." Stranges Manual, § 291, was relied on by the respondent as showing that the Pundits of the late Sudder Court were on her side, and that the younger Strange approved their opinion: but the High Court pooh-poohed the Pundits, went upon '*principle*', and decided off-hand that the unfortunate widow had lost everything by her husband's neglect or omission. In doing so the Court observed :—"The decision of the judicial committee in the *Shivaganga case* has settled that there may be property of a member of an undivided family which is subject to all the incidents of parted property. This is the converse of that case. There seems nothing in principle to prevent the members of a family from being considered divided as to a portion of their property while the status of non-division with all the incidents of joint tenancy attaches to the portion which, for any reason of convenience or otherwise, they have chosen to leave undivided."



The '*principle*' upon which this case should have been decided is, I would humbly submit, the leading principle of the Hindū idea of law, that: The only right use of wealth, however extensive, is for the promotion and enlargement of the *dharma* of a family, and therefore part of the wealth of a given family can properly be turned from its legitimate use, in promoting and enlarging *dharma* for that family as an undivided whole, only when a sub-family is formed out of that family by separation, and needs wealth for its own proper *dharma*, and part of the wealth of the original family is allotted to the sub-family to enable it to perform for itself and on its own behalf sacrifices and other works necessary for *dharma*. It seems to follow from the admission of this principle that a divided family cannot be and remain '*undivided*' as to part of its property. For a separation once effected, and sub-families formed, the *dharma* of each sub-family must from that moment be sustained by the appropriation to it of the income of the whole of the share of property to which the sub-family may be entitled. Wealth cannot lie idle. It must be used. And it can properly be used only in one way. This most important principle has been referred to above at p. 57, and will be referred to again in a later part of this essay.

Doctor Burnell has kindly informed me¹ that the Sanskrit law enjoins a Hindū: "*Vibhajed artham*," that is to say to divide the entire wealth, and that



the noun *artham* being collective and incapable of being understood to include a part only of the wealth, the proposition put forward by the High Court is opposed to grammar. Also that it is illogical, in that the family property being subject always to *dharma* charges, and these charges being chargeable on the family property as a whole, if the family be partly divided, the charges also must be divided, which is impossible. This view, Doctor Burnell tells me, is taken by Mayr, "Das Indische Erbrecht," Vienna, 1873; and by Barthélemy St. Hilaire, "Journal des Savants," 1875 (August) p. 510:—"Quand on réclame le partage il doit s'agir toujours du partage total, et l'on ne serait pas reçu à demander que quelques uns des biens restassent indivis."

Upon this question confer the Appendix to Professor Goldstückers Paper, referred to above.





CHAPTER III.

SOME TRUE PRINCIPLES.

Upon beginning an inquiry as to what principles actually are contained in the Sanskrit law-books that oblige, or are supposed to oblige, Hindūs resident in the Madras Province, probably the first thing to strike the mind will be the extreme scantiness of the materials ready to the hand of an inquirer. Professor Goldstücker*, after suggesting that "Hindū law concerns two topics of litigation only, that of inheritance and that of adoption," goes on to state upon the authority of Colebrooke that the *Mitāṣarā* "Is, with the exception of Bengal, received in all the schools of Hindū law, from Benares to the Southern extremity of the Peninsula of India, as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent." And then he declares, apparently upon the authority of Mr. Standish Grove Grady and other gentlemen who have never set foot in India, that the *Mitāṣarā* was expanded in subsequent digests, and in consequence the *Smṛti Chandrikā* and *Vyavahāra Mādḥavīya* became the first legal authorities, on matters of inheritance, at Madras: whilst as to

*His 'Paper' of 1871, p. 3.



adoption the learned Professor tells us that the *Dattaka Mimāṃsā* and *Dattaka Chandrikā* are the two principal authorities. Later on in his Paper, namely at p. 17, he declares explicitly that the *Mitāṅgarā* is not the primary authority in the Madras Province, but being incomplete in many respects has been superseded by the *Smṛti Chandrikā* and *Vyavahāra MādHAVIYA*, which two works "have become the chief authorities in the South." I am sorely tempted to pause here and discuss some questions, such as : Since when have these two works become the chief authorities in the Madras Province ? And by virtue of what order or opinion ? But I will refrain.

At the beginning of his admirable Preface to his *Varadarājas Vyavahārā-Nirṇaya* Doctor Burnell states that partition and succession is the "only branch of Brahmanical law now practically of importance." And then that : "All the treatises current in Southern India however only amount to five." These are (1) the *Mitāṅgarā*, (2) the *Smṛti Chandrikā*, (3) *MādHAVAS Dāya-Vibhāga*, (4) the *Vyavahāra-Nirṇaya*, and (5) the *Sarasvatī-Vilāsa*. Now Doctor Burnell does not say what he means by "current in Southern India," and I am at a loss to understand what he can mean by the expression. But one thing seems to be quite clear, and that is that Doctor Burnell did not mean well known to, and generally respected and consulted by, the natives of the Madras Province. For he has given



as the reason why he had not yet finished the *Sarasvatī Vilāsa*, that he, a most indefatigable and successful collector of manuscripts, "had only got as yet two MSS."! To me this appears to be tantamount to a confession that the work, however interesting and valuable it may be as a speculative disquisition, is wholly unknown to the great bulk of native readers, and is not in any sense an authority on law.

Excluding this work from consideration, and also the *Smṛti Chandrikā* which at present is known only through a very imperfect translation, persons ignorant of Sanskrit have but three works upon the Hindū law of Madras left to study, namely the *Mitāvarā* and the two books translated by Doctor Burnell. If Professor Goldstückers translation of the *Smṛti Chandrikā* is ever published, we shall have four so-called works of authority, and Doctor Burnells promised edition of the *Sarasvatī Vilāsa* may be a fifth. More than these five works of reference the courts probably will not have for many years to come.

I have already expressed my doubts as to the *Mitāvarā* being what it is assumed to be, namely a work of paramount authority on the law of partition and succession in the Madras Province, and indeed have ventured to suggest that the *Mitāvarā*, as a treatise on law, perhaps is wholly unknown to the natives of South India, with the exception of those who have had business in our courts of justice.



However this may be, it is a fact that the *Mitāṣarā* is regarded by the High Court of Judicature at Madras and by the judges and practitioners of the courts generally as the ultimate authority on the matters with which it deals, and for the present I also must so regard it.

Doctor Burnell tells us in his Introduction to *Mādhava's Dāyavibhāga* that both in form and matter that work closely follows the *Mitāṣarā* and *Smṛti-Chandrikā*, and on the whole, as far as the law of inheritance goes, is little more than an abridgment of the *Mitāṣarā*, except in some of the last sections. And with regard to the *Vyavahāra-Nirṇaya* the same writer observes in his Preface thereto: "*Varadarāja* is an adherent of the doctrine taught in the *Mitāṣarā*, and only goes beyond it in one point that he admits brothers' sons' sons as heirs after brothers' sons."

Really therefore one who desires to acquaint himself with the Hindū law of the Madras Province, if he has no Sanskrit, needs to study translations of the *Mitāṣarā* and of two small works founded on that work, and no more. Before attempting to ascertain what principles appear to be established by these works, I think it desirable and necessary to observe that if there is one thing more certain than another in Sanskrit law, it is that the writers of the digests and commentaries and treatises generally thoroughly appreciated the necessity of upholding to the greatest possible extent local customs and



usages. I am informed that the Sanskrit books on law contain numberless texts going to show that legal principles must not be permitted to interfere with and supersede established customs, and in short that what was settled anywhere must not be disturbed. And particularly the existence and legality of local customs is supported by the Mīmāṃsā system, which is that upon which the system of interpreting law-books depends. Doctor Burnell has most kindly furnished me with the following translation of part of the *Deḡadharmā* Chapter in the *Smṛti Thandrikā*. It shows, if anything can, the sacredness of custom in the eyes of writers on Sanskrit law. And at the same time it serves to illustrate Ellis' remarks, given by me at p. 93, above, to the effect that the law of the *Smṛtis* has never been the law of the Tamil and cognate nations. As to this see at p. 9, above, what Manu wrote about the *Drāviḡas*.

The translation is as follows, namely:—"Next the laws of *particular* countries are explained. In regard to this BAUDHĀYANA says:

"There is opposition in a five-fold way to the general established law in respect of people of the South, and also of the North. We shall explain those respecting the South; these are eating in company with one not invested with the *Brahmanical* string; eating in company with one's wife; eating of stale food; marriage with one's maternal uncle's or paternal aunt's daughter. So as regards



the North: dealing in woollen cloths; drinking spirits; trading in cattle; the profession of arms; travelling by sea. One doing *such an act* in another *not his own* country is polluted. Different rules are in force in different countries."

The meaning is this: 'The one' a Southern *man* who eats together with an uninvested person and the like 'in another country' in the Northern country 'is polluted'; but not if he does so in his own *Southern* country. Why? Because of the rule of the country; of the rule in *that* country; because of the established custom of the country--such is the meaning.

BRIHASPATI also *says*: "A maternal uncle's daughter, &c. is married by Brahmans of the Southern country; in the central country artisans (? workers in leather) and mechanics eat beef: men of the Eastern country eat fish, and their wives are of loose life; men of the North drink spirits, and women ceremonially unclean are touched by men; brothers take a brother's wife who has lost her husband."

He also mentions the authority of local custom: "Those *dharma*s of countries castes and tribes which are practised by them, they are thus to be preserved; otherwise people are agitated."

Devala also *says*: "What Gods *there are* in any countries, what Brahmans *there are* in any countries; what water and what soil *there are* in any countries; and whatsoever be the custom and law



anywhere, one should not despise them *there where they exist*; the law is there such. What is the settled law in any country, city, village, assembly of Brahmans learned in the three vedas, or town, one should not disturb that law."

So Manu attached to the authority of local laws, without distinction, says:

"What is done by learned men, &c." (See VIII. 46.)

So also GAUTAMA *says*:

"The customs of countries, castes and tribes if not opposed by traditional sacred texts are authoritative." Here and there customs opposed *by traditional* Veda texts are noticed; so such opposed customs are *here* exhibited: (*e. g.*) actually among the Southern people *there is* marriage of a maternal uncle's daughter, *a marriage* vitiated by the kinship with the mother."

(Several other examples which are of no interest here follow. These and the above a king must establish and enforce.)

In the same way what is generally opposed is to be given up. VARĀHAMIHIRA *says*: "The custom of the country is first to be considered; what is the rule in each country that is to be done; wise men avoid what is generally detested. So let an astrologer follow the way of the world." "

The most important of all principles of Hindū



law I take to be, that: Whatever rule of conduct may appear to be prescribed by a Sanskrit law-book, or by all or most Sanskrit law-books, if the sovereign finds that there exists in any country a custom opposed to and incompatible with such rule, in that country such rule must not be enforced: the opposite custom must be upheld, and the minds of men must not be agitated by an attempt to take from them a state of things to which they are used.

Another principle of almost equal importance seems to be this. The Sanskrit law-books contain rules of conduct prescribed for certain specific castes, that is to say, for Brahmans, *Kshatriyas* and *Vaisyas* and in a very few instances for *Çūdras*. But in the Madras Province the only *Āryans*, if any, to be found at the present day are the Brahmans, excepting always a few *Kshatriya* families said to exist on the Western Coast, and therefore Sanskrit law should be applied, if at all, to the Brahmans alone of all the population of the Madras Province.

As to this, see what Doctor Burnell wrote in his introduction to the *Dāyavibhāga*, p. xiii., n. I: "Are there any *Āryans* except Brahmans in South India? If not, and there seems little doubt that this is the correct opinion, the authority of the *Dharma Çāstra* must be much restricted. Confer Doctor Caldwell's Dravidian Grammar, pp. 73—77. The few Xatriya families on the Western Coast are under local law." And again at p. xv. of the same:—"By custom only can the *Dharma Çāstra* here be



the rule of others than Brahmans, and even in the case of Brahmans it is very often superseded by custom."

A third principle would seem to be that in putting a construction upon a given text or portion of a Sanskrit law-book, the use of words of art proper to the English and other systems of law must always and most scrupulously be avoided. In remarking on the vulgar error prevalent with respect to the meaning of "*self-acquired property*," Doctor Burnell has observed: "The technical terms of Hindū law are in Sanskrit very precise; the translations of them which are universally adopted at the present day are due to Sir W. Jones and to Colebrooke. The equivalents chosen by the latter are singularly apt, yet in many cases they have been misunderstood, e. g. a common misapprehension prevails in respect of the term 'self-acquired' property." Incalculable harm seems to have been done by Colebrooke choosing these "singularly apt equivalents," and perhaps it is not too much to say that many Englishmen who begin to dabble in Hindū law are at once taken off the right course, and ever after kept in a wrong course, by being erroneously taught that Sanskrit law-books contain many terms and phrases with which Englishmen are hereditarily familiar. A few instances will suffice to explain my meaning. '*Dāya*' is rendered in our translations '*heritage*,' whereas the word in no way denotes or connotes what is gotten by one's '*hæres*': but appears always



to denote simply and solely "*what is given*," and mainly to connote the handing over of wealth by a dying or aged Father to his expectant sons. In fact the Roman idea of being '*heir*' to another is wholly foreign to the Sanskrit notion of law, and no term connected with that idea can be introduced into our translations of Sanskrit law-books without breeding misconception. Then '*Artha*' and '*Dhana*' mean very different things, though both are represented in translations by '*wealth*'; and an important argument has been founded on the use of the former term in a certain connection as has been shown at p. 110, above. The terms '*ownership*,' '*division*,' '*separation*,' &c., &c., are used very loosely, and so as to cause confusion.

Having premised that:—(1.) The Sanskrit law-books that need to be studied by Englishmen in Madras are very few: (2.) Existing customs must be held sacred: (3.) The positive laws to be found in the Sanskrit law-books probably should be enforced, if at all, only amongst the Brahmans of the Madras Province: And that (4.) In seeking the meaning of the texts of these books the student must rigidly abstain from using English words as "*apt equivalents*" of Sanskrit words of art:—I will now go on to deal very briefly and generally with the contents of the Sanskrit law books above referred to and some others.

The books begin by supposing the existence of a family consisting of a man and his wife and their children male and female. The '*Father*' has been



separated from the family to which he belonged when born, and has set up a sub-family, of which he is the '*Governor*'. As such, he is obeyed by all the members of his family without question or demur. All obey him, and he must protect all, particularly in times of distress. Ordinarily, the principal mode of protecting the family is by promoting and enlarging the *dharma* or virtue of the family. This (see p. 57 above) is principally effected by performing worship, sacrifice and ceremonies, by giving alms, and doing meritorious acts generally. To do these things costs money, and to enable the '*Father*' to do them, whatever individual members of the family may earn, must be handed over to the '*Father*' to be by him properly expended. Ordinarily:—So long as the '*Father*' lives, the sons living under him are not '*independent*' in respect of the performance of religious duty, and consequently in respect of the enjoyment and expenditure of wealth; but by birth they have a certain right over the wealth that the '*Father*' enjoys, and that right warrants them in doing certain acts, as will presently appear. Not being '*independent*' they cannot validly aliene or even use the family wealth. It may happen, however, that the '*Father*' may grow tired of the world, and resolve to abandon for ever the management of the affairs of the family. Or he may be disabled by chronic disease from rightly performing his duties as Manager. Or he may disqualify himself for the performance thereof by indulging



in vicious and extravagant expenditure and sinful waste of the wealth under his charge. Or he may become an outcast. In these and some other cases, when the '*Father*' ceases to be qualified to manage the affairs of the family, his '*independence*' ceases as of course, and the sons are warranted in transferring the management from the '*Father*' to the first-born son, or, if he be not qualified or not willing to act, then to another member of the family who is qualified and willing: and perhaps in some cases in effecting a partition of the wealth of the family.

The first principle then to be gathered from Sanskrit law-books appears to me to be that:—The '*Father*', generally speaking, is the lord of his house, and as such is wholly '*independent*' of his sons, and the sons are not independent of the '*Father*', insofar as the enjoyment and expenditure of wealth and general management of the affairs of the family are concerned: but if the '*Father*' improperly affects to make away with property acquired by succession, the sons or any of them may forbid him; and so if he attempts to make an unequal partition thereof.

The '*Father*', being lord of the house and independent of his sons, may, if he thinks fit, separate his sons from him and from his wife. He cannot separate his wife from him in any case.

If the '*Father*' separates his sons from himself and his wife, he must make an equal partition of what he may have acquired by succession, so that he and his wife (or wives) and sons may take each an equal por-



tion of wealth. But the portion of his wife or the portions of his wives must be taken by the '*Father*' for her or them.

What the '*Father*' has acquired for himself by his own exertions, he may if he please divide unequally or retain for himself: over that the sons have no right during his life. And property lost by the grandfather but recovered by the '*Father*' comes under the head of the '*Fathers*' self-acquired property. The *Dāya-vibhāga* after stating in § 16 that: "In no case is there an unequal partition in the case of the grandfathers property," goes on in the next following section to give the exception in the case of partition of recovered property, thus:—

Exception in the case of partition of recovered property. "Manu has said that sometimes in the case of property gained by the grandfather there is partition at the will of the father, as in the case of self-acquired property:—

"The father who recovers ancestral property which was not obtained, need not against his will divide that among his sons, as it is gained by himself." The property that was acquired by a grandfather and taken by some one else if not recovered by the grandfather; but if the father recovers it, then as it is like property self-acquired, he need not divide it with his sons against his will; and so it has been declared that in the case of property acquired by the grandfather, the partition is at his will. Br̥haspati says:—"The right of ownership



of the father has been declared in the case of a grandfather's property recovered by him, and in what he has earned by his own power, or by his knowledge or heroism, &c."—Kâtyâyana also says:—"What has been recovered by his own exertion after being lost, and what he has himself obtained, all that the father cannot be forced by his sons to divide." The meaning is, that the property which was inherited by course of descent but which was seized by other persons, and that which he himself has acquired by learning, heroism, &c., all that the father cannot be caused by his sons to give in partition."

If the '*Father*' dies without separating his sons from himself and his wife, the possession of independent power and ordinarily the management of the affairs of the family at once devolves upon the eldest son, who resembles the '*Father*' and is the natural protector of the widow (or widows) of the '*Father*' and of the other sons of the '*Father*', and of the family generally. If the other sons of the '*Father*' choose to continue to dwell together, living under the protection of the eldest son and looking up to him as the '*Governor*' of the house, they may do so: and from a worldly point of view their doing so may be advantageous. But '*dharma*' will be promoted and enlarged by the brethren separating one from another and making a portion of the whole wealth (*artha*) of the family: and therefore separation is proper for the sons upon the death of the '*Father*'. Moreover, if they omit to separate, and their sons also omit to



separate, their grandsons will be debarred by law from claiming partition of what was acquired by the '*Father*' by succession, since the right to partition ceases with the fourth in descent from the owner. As to this see p. 35 above.

There being most cogent reasons for the sons separating upon the death of the '*Father*', and making a partition of the whole wealth of the family, we will assume that they do so. In that case the partition must be in all respects equal and fair. The widow (or widows) of the '*Father*' must have an equal share (or equal shares) with the sons, and not a maintenance, although she (or they) could not claim to have a partition of wealth made against the will of the sons. And so with the widow of any son who may have died. And if there are grandsons whose fathers have died, they will take per stirpes the shares that their fathers would have taken, if alive, of what was acquired by the '*Father*' by succession. Before allotting shares, provision must be made to meet the demands of all who may have demands upon the joint estate, such as creditors, unmarried daughters, uninitiated brothers, and others. And if the birth of a posthumous son appears to be probable, partition should be deferred.

When partition is thus made, questions may arise as to what is, what is not, liable to partition; and particularly as to whether wealth that has been '*self-acquired*' by one of the sons, should or should not be



parted amongst all. Ordinarily, such wealth will be partible, on the principle that a son not separated from the '*Father*' belongs to the '*Father*' and acquires only for him, as the '*Governor*'; and it will be difficult to prove that such wealth was not "acquired with the use of the paternal or other common wealth." An acquisition made wholly without the use of such wealth is not partible. But the general rule is that stated at the beginning of Chapter VI. of the *Smṛti Chandrikā*, namely, that:—"What belonged to the grandfather or to the father and anything else (appertaining to the co-heirs having been) acquired by themselves must all be divided at a partition amongst heirs." In other words: So long as a family continues to be joint, generally all expenditure is by and for the family, and all acquisitions are by and for the family, and it is quite immaterial for the purposes of partition whether a given acquisition was made by one member of the family or by another.

A separation of the sons from one another and from the widow (or widows) of the '*Father*' once effected, the rights and duties and relative positions of the sons become very different. With regard to the state of union of a Hindū family Professor Goldstücker observes in the Appendix to his Paper, p. 32:—"The oldest Hindū law-givers lay down the rule that members of a united family have a joint community of worldly and spiritual interests. Hence, according to them, their income and expenditure is conjoint; they cannot individually accept or bestow gifts, or make loans; nor



can they reciprocally bear testimony, or become sureties for one another; moreover, certain of their religious duties being undivided, one member of the family only is entitled and obliged to perform them for the rest."

But of brothers and other members of a family in which separation has taken place, all the religious duties are separate, except that the funeral ceremonies and the sixteen *Śrāddhas* up to the *Sapīṇḍana* should be performed by one of them only. And the religious duties being separate, each son is 'independent' in respect of his own wealth, and separately manages his own affairs, without in any case needing the consent or authority of others his relatives.

After separation one of the sons may die leaving no son, natural or adopted, and if one so dies, his widow, if virtuous, at once succeeds to the enjoyment of his whole wealth, offers the *pinda* for him and causes *Śrāddhas* to be performed, in preference to his uterine brother and other relatives, to all of whom she is superior by reason of the many and great benefits, temporal and spiritual, that the wife confers on the husband.

Having succeeded to the enjoyment of the wealth of her lord, the chaste widow may use it with moderation: and apparently may validly aliene at least part of the immovables for the purpose of promoting and enlarging *dharma*, but for no other purpose. After the widows death the wealth goes to the relatives of her lord in a certain order of succession determined with reference to the preferen-



tial right of a person to cause *Śrāddhas* to be performed. As to this see Professor Goldstücker's Paper, p. 21. In default of the widow the daughter succeeds, and in her default the daughters son; and next the parents; then uterine and other brothers, and their sons and perhaps grandsons; and after them *Gotrājas*, *Bāndhavas* and others. As to these last Professor Goldstücker has given some useful information at pp. 21 et seq. of his Paper.

If the wife dies before the husband, the general rule is that her children, daughters before sons and unmarried before married daughters, take her separate wealth (*Strīdhana*); and in default of children, the husband, supposing the marriage was of a proper kind. If it was not, the wife's father and mother take her wealth. What is and what is not *Strīdhana*, has been and is the subject of much speculation. See p. 77, above.

If one of the separated sons has no son, he may adopt one. In selecting a person to adopt, he will follow the custom of the country in which he lives, or of his caste, and must not merely study his own private wishes. With regard to authorizing a wife to adopt, enough has been said at pp. 101—8, above.

If upon the death of the '*Father*' the sons prefer not to separate one from another and from the widow (or widows) of the '*Father*', and the eldest son or a younger undertakes the management of the family affairs, things will go on very much as they did during the lifetime of the '*Father*', except that the '*Fathers*'



self-acquired wealth will now have become ancestral wealth, and none will have power to give it or part of it away without first obtaining the consent of the rest, unless in extraordinarily emergent circumstances such as a time of famine and the like. But the widows of the '*Father*' and of any of the sons who may have died will be placed in a new position by the deaths of their husbands, inasmuch as they will be entitled to claim at the hands of the managing member whatever shares of the family income their respective husbands would enjoy, if alive, for their private use after the general expenses of the joint family have been duly met. Practically, however, this right will be of but little value, since ordinarily the managing member will expend the whole income of the family about the family as a whole. It does not appear that the widows will have any power of interdiction, or of making the managing member account, however wastefully or fraudulently he may manage affairs, so long at least as the integrity of their husbands shares is not threatened. And it seems to be quite clear that they cannot force the male members of the family to make partition of the family wealth. When the male members resolve to make such partition, the widows will take shares equal to the shares of the sons.

When a partition of the family wealth has been made, the fact may be denied in a suit, and a question of great importance and difficulty thereby raised. Chapter XVI. of the *Smṛti Chandrikā* deals with the



evidence of partition alone. In ancient times, it seems, certain facts such as the members of a family living and eating apart, one member bearing testimony for another, one lending money to another, and the like, were held to be sufficient criteria by which to judge of the probability of partition having taken place. But however conclusive these "*signs of separation*" may once have been, it seems to be quite clear that nowadays no aggregate of such signs will suffice in itself to prove the fact of partition having taken place; and that, as suggested in the Introduction to the 'Digest of Hindū law' by Mr. West and Dr. Bühler:—"It is in every case a question of fact to be determined like other questions of fact, upon the whole of the evidence adduced, circumstantial evidence being sufficient." Professor Goldstücker has strenuously contested this proposition, but in my opinion without great success. Had he lived in the Madras Province, and so been enabled to gauge the ignorance of its inhabitants as to what religious ceremonies are prescribed by Sanskrit books, and their indifference as to performance thereof, he would, I imagine, have felt but little disposed to insist on the necessity of Indian judges studying Sanskrit works on ceremonies for the purpose of qualifying themselves to decide an issue of fact about partition.

After a separation and partition has been effected, the members of a family, or some of them, may come together again, throw their wealth into a joint stock and form what is styled a '*re-united*' family. In



practice a re-union of this kind is, I believe, not very uncommon. Its results are not particularly noteworthy.

Such, very briefly and roughly, are the general principles that, I apprehend, may be gathered from those parts of Sanskrit works which deal with the important subject of succession. As will be seen at a glance, they are for the most part directly antagonistic to the principles that have been established by the High Court of Judicature at Madras. And unless I am greatly mistaken the Government of Madras will before long be compelled to take steps to ascertain to what extent the High Court has been making law for the millions under its jurisdiction, and how far its work has been in accordance with the customs and usages of the people. The Government of Madras has on several occasions declared that the laws and customs of the (so-called) Hindūs in respect of succession, &c., shall be upheld by the judges of the land: but if my view of the case is even approximately correct, so far from upholding those laws and customs the High Court of Judicature at Madras has actually done its very best to stamp them out and substitute for them laws of its own invention. The laws made by that court I believe to be essentially bad laws, wholly unsuited to the social system of the (so-called) Hindūs, and productive of disastrous results, one of which is a growing unwillingness on the part of capitalists to advance money on what ought to be excellent security, and the consequent steady fall in the value of rights over land.

I have suggested at the beginning of this chapter that the number of Sanskrit law-books that need to be studied in the Madras Province is very small, and that custom is always to be preferred to anything contained or supposed to be contained in those law-books : I will end the chapter with an extract from one of Doctor Burnells writings, going to show that the Sanskrit law-books from which the Madras High Court of Judicature deduces its rules never were used, and never were intended to be used, as codes of law. He observes at p. xiii. of the Introduction to the *Dayā-Vibhāga* :—“ A great difference between the original Smṛtis is apparent, and this in accordance with the differences between the Brahmanical Çākhās in other respects, but there is no reason to believe that these works do not represent the actual laws which were administered. On the other hand, the case of the modern so-called digests is very different. They are based on the principle that one Smṛti is to be supplemented by another, and thus the authors are sometimes much embarrassed by the differences in those books. This theory no doubt arose from the endeavours of the Vedantists and especially Çankara to bring everything into harmony, and is conclusive as to the authority of the Smṛtis at that time. Had they not given place almost entirely to custom it would not have been possible to attempt the compilation of digests on such a plan ; but though so far obsolete, the belief that their texts were founded on the Vedas, saved them from total neglect.



The digests however were never intended to be actual codes of law; they were written in a language understood by a very few, and because of the Vedic quotations in them, they must have remained almost exclusively in the hands of the Brahmans. Again they refer for the most part to the Brahmans only, and utterly ignore the numerous un-Aryan peoples scattered about India, and which form the greater part of the population of the south, whose usages (whatever they may call themselves) can in no wise be referred to the Dharma Çāstra. There is not a particle of evidence to show that these works were ever even used by the Judges of ancient India as authoritative guides; they were, it is certain, considered as merely speculative treatises, and bore the same relation to the actual practice of the courts, as in Europe treatises on jurisprudence to the law which is actually administered."



CHAPTER IV.

CUSTOM VERSUS LAW.

I have now to deal with what practically is the most important of all questions of Hindū law, namely the question: To which, if any, of the very numerous tribes and castes constituting the mixed population of the Madras Province, or to what classes of men, if any, should the Hindū law be applied? In other words: Who and where are the '*Hindūs*' of the Madras Province to whom the '*Hindū law*' should be administered by our courts of justice?

I would observe in the first place that, if it be conceded for arguments sake that there really exists such a thing as "*Hindū law*", the burden of proving that that law should be administered to a given tribe or caste or class of men in South India, necessarily must rest upon him who avers that that law is the law of such tribe caste or class: and he who simply denies the truth of the averment must not be called upon to prove anything by evidence, unless and until his opponent makes out for himself a reasonably good case. But inasmuch as I have never yet been so fortunate as to meet with an argument intended to establish the fact that a particular tribe



or caste or class of men in South India is, or should be, subject to the Hindū law, and have no idea how a skilful disputant would go about to establish such fact, I must do my best to make out my own case without reference to what possible antagonists would go about to do in the matter.

The most convenient mode of classifying the non-Muhammedan natives of the South of India is by dividing them into Brahmans and non-Brahmans. However degenerate our one million and odd Brahmans may have become, mentally and physically, however great may be the change that has come over them since the days in which they successfully struggled against Buddhism, there can be no question but that, as a body, they are separated by a wide gulf from the rest of the population; whilst the difference between any two ordinary non-Brahman castes is comparatively slight, and to a stranger almost impalpable: and no non-Brahman caste attempts to rival our Brahmans in strict performance of religious duty and in propriety of conduct from the Hindū point of view.

Now with regard to our Brahmans, I have already expressed my doubts as to whether they are very Brahmans descended from *Ārya* ancestors who came from the Punjab, and have shown that in all probability they have not attempted to preserve the laws set to their early progenitors. But very Brahmans or not, they at all events profess to be Brahmans, and as such to guide themselves by rules



supposed to have been revealed to saints in pre-historic times, and by them taught to ordinary men.

As a matter of fact they guide themselves by written collections of '*Customs*', that may be compared with the "customs of Arragon", the Brehon laws of the Irish, and other compilations. And this being so, there can be no objection, I imagine, to our courts administering to our Brahmans so-called law taken from *Smṛtis*, Digests and other works on "*Hindū law*", so long as our courts abstain from interfering with actually existing, established customs of Brahmans that are opposed to "*Hindū law*" as contained in Sanskrit books, but nevertheless ought, in accordance with express provisions of that very law, to be maintained inviolate.

With the innumerable non-Brahman castes of the Madras province the case is very different. None or very few of them profess to belong, or have any the slightest claim to be regarded as belonging, to any of the classes that the writers on Hindū law had in contemplation when they wrote. The very existence of these castes, or at all events of most of them, was certainly ignored by, probably wholly unknown to, the compilers of the *Mitākṣarā* and other works of "paramount authority" in the South of India. As Doctor Burnell observes:—*

"Custom has always been to a great extent superior to the written law in India, and especially so in the South; but the Indian jurists never attempted

* Introduction to the *Daya-Vibhāga*, p. 207.



to record such merely human details, hence the difficulty of the law of marriage and caste usages on which questions of inheritance often depend. By custom only can the *Dharma-Çāstra* here be the rule of others than Brahmans, and even in the case of Brahmans it is very often superseded by custom."

That the *Dharmā Çāstra* is '*by custom*' the rule of the great bulk of the non-Brahman population of the Madras Province, it would, I am convinced, be impossible to show. For when the daily life of ordinary non-Brahman natives is looked at, it becomes at once apparent that whilst on the one hand they habitually leave undone things that Brahmans do, on the other hand they habitually do things that no Brahman could do and live in caste. For example many castes practise polyandry.

It was discovered some years back that the usages of the people of the Western Coast were so greatly and palpably inconsistent with Hindūism that the administration to them of what is known as "*Hindū law*" was wholly impracticable, and accordingly the Madras High Court brought itself to '*recognize*' the peculiar customs that obtained in that part of the Madras Province, and to grant to the West-Coast men the rare privilege of managing their private affairs after their own fashion. For some time, therefore, the Madras High Court has administered one kind of law to the so-called Hindū inhabitants of the Madras Province generally, and another kind of law



to the inhabitants of the Western Coast. But to be consistent, logical and just, the High Court must recognize not only the peculiar customs of the Western Coast, but also those of every tribe or caste living within its territorial limits of jurisdiction. As bidden by the Madras Civil Courts' Act, it must allow the force of law to every well established custom, whether found to exist on the Western Coast or on the Eastern, or inland, or on the mountains of Madras.

The manners and customs and religions of the non-Muhammedan inhabitants of South India are so widely different from those of Europeans that Englishmen are apt, not only upon first coming to the country but so long as they stay in it, to regard them as all precisely alike, just as a person unused to sheep looks upon every animal in a flock as being in every respect similar to all the rest. But the shepherd knows his sheep, and his dog knows them, and there can be no doubt that a patient inquirer might learn enough about the principal tribes and castes of South India readily to detect striking peculiarities that separate each of them from every other. If all professed one and the same religion, that fact would not in itself warrant the supposition that all followed the same customs in respect to succession to property and the like; for whilst nearly all the countries of Europe profess the Christian faith, each has its own peculiar laws regulating the devolution of property and other affairs. But as a matter of fact many religions are pro-



fessed by so-called Hindūs; whilst probably the great majority of them profess no religion at all, but content themselves with the irregular propitiation of the petty devils of their respective villages: indeed nothing can be more striking to a superficial observer than the diversity of forms of faith obtaining in South India, where may be found Muhammedan *Drāviḍas*, Christians, Jains, Lingayets, Vaishnavites, Vēdāntists, *Smārtha* Brahmans, Pariahs, Devil-worshippers, and many other sorts of believers.

Whilst speaking of beliefs I may conveniently notice here the fact that a very large number of tribes and castes in South India decline to believe in the divinity and authority of the Brahmans, and altogether keep aloof from them. How large the number of persons who do this is, I have no means of knowing, but I believe it to be very large indeed. Now, persons who decline to recognize Brahmanical authority, and habitually perform religious duties without Brahmanical assistance and guidance, can hardly be called Hindūs. Whatever such persons or their ancestors may have been, they cannot be held now to be in communion with their Church, and in fact are out of caste. The refusal of many castes in ancient times to accept the Brahmans as their pastors and masters would seem to have bred an hereditary feud between two groups of castes known as the '*right-hand*' and '*left-hand*.' The origin and history of this feud at present are wholly unknown, but it seems to me to be not improbable that



the feud sprang from rivalry and contention between the supporters and adherents of the Brahmans on the one hand and those of the Goldsmiths and other artificers on the other hand. In the South of India the Goldsmiths appear, as a body, strenuously to have resisted the aggressive supremacy of the Brahmans, and for ages to have claimed for themselves the right to be priests and spiritual guides, styling themselves "*Āchāryārs*" (religious teachers) and wearing the sacred thread. With them we find associated the carpenters, stone-masons and metal-workers, weavers, leather-workers and others, the whole body forming the '*left-hand*'; whilst the '*right-hand*' (that of honor, orthodox?) is made up of the *Vellālans*, *Kavareis* and other cultivating castes, merchants, accountants, and amongst others the Pariahs, who seem in some degree to have been kindly treated by the Brahmans of South India, perhaps because of their great numbers and superior bodily strength. If the matter were properly looked into, very probably it would be found that the constituents of the '*left-hand*' (or most of them) are not, and do not pretend to be, Hindūs in any ordinary sense of the term: whilst the principal constituents of the '*right-hand*', who are for the most part the principal wealth-producers of the country, may have been flattered and coaxed by the Brahmans into a somewhat more scrupulous observance of Hindū practices than has been usual with other non-Brahman castes in the South of India.



As has been shown at p. 9 above, it was written many hundreds of years ago that the *Drāviḍas* had gradually sunk into the state of out-castes from the extinction of sacred rites and from having no communication with Brahmans. No doubt this was a true statement, and we may profitably compare it with the following statement to be found in an old monograph known in the Madura District as "Wards Survey Account". The writer says of a certain Telugu agricultural caste called the *Tōtti-yar's* that, though they profess to be Vaishnavites, in fact:—"Each household has its household deity. They have *Gurus* of their own caste, instead of Brahmans, one of whose privileges appears to be to lie with the wives of their disciples whenever they feel inclined. After marriage it is customary for the *Tōtti-yar* women to cohabit with their husbands' brothers and near relatives, and with their uncles; and, so far from any disgrace attaching to them in consequence, the priests compel them to keep up the custom if by any chance they are unwilling. Outside the family circle they affect to be strictly chaste." From this short account of the manners and customs of a so-called Hindū caste two important things seem to be gatherable, namely:—

(1). The caste wholly repudiates Brahman interference.

(2). The caste openly practices polyandry.

These two circumstances existing, few, I imagine,



will venture to aver that the *Tōttiyars* are Hindūs, and being such should be made to guide themselves by the Hindū law.

It must not be supposed for a moment that the *Tōttiyars'* case is exceptional and standing by itself proves nothing. Judging from what I have learnt by inquiry about the Madura District, an extensive area of country that may be taken to be a fair specimen of the territories subject to the Government of Fort Saint George, I should be disposed to believe that polyandry is quite common in the South of India, taking the form of openly practised concubinage as between the wife and the husbands relatives. Thus, as I have shown in the "*Madura Manual*", the Western *Kallars* of the Madura District have a curious custom of assigning a woman as wife to ten, eight, six or two husbands, who are held to be the fathers jointly and severally of any children that may be born of her body. And when such children grow up, they call themselves the children of eight and two, or of six and two, or of four and two fathers, not of ten or eight or six fathers.

Amongst the *Kāraikat Vellālars* of the Madura District, as appears from the "*Madura Manual*", Part II. p. 33;—"Wives are accustomed, it is supposed, to grant the last favor to their husbands' relations. Adultery outside the husbands family entails expulsion from caste, but the



punishment is practically not very severe inasmuch as a Kunnuvan can always be found ready to afford protection and a home to the divorcée. A man who disgraces himself by an illicit connection with a woman of a lower caste than his own is punished in a similar manner. Formerly the punishment was in either case death. Where his wife proves to be barren, a man may with her consent marry a second wife and practically she cannot in such case withhold consent. But in no other case is a plurality of wives permissible. Widows however are free to re-marry."

Amongst the *Kunnuva Vellālars* (See the "Madura Manual", Part II., pp. 34 and 35):—"A woman may legally marry any number of men in succession, though she may not have two husbands at one and the same time. She may however bestow favors on paramours without hindrance provided they be of equal caste with her. On the other hand a man may indulge in polygamy to any extent he pleases, and the wealthier Kunnuvans keep several wives as servants, particularly for agricultural purposes."

"Amongst the Western Kunnuvans a very curious custom is said to prevail. When an estate is likely to descend to a female on default of male issue, she is forbidden to marry an adult, but goes through the ceremony of marriage with some young male child, or in some cases with a portion of her father's dwelling-house, on the understanding that she shall



be at liberty to amuse herself with any man of her caste, to whom she may take a fancy : and her issue, so begotten, inherits the property, which is thus retained in the womans family. Numerous disputes originate in this singular custom, and Madura Collectors have sometimes been puzzled not a little by evidence adduced to shew that a child of three or four years was the son or daughter of a child of ten or twelve."

An extraordinary custom appears to prevail amongst the *Vellalars* of Caroor, of fathers getting adult women as wives for their infant sons, and themselves cohabiting with those women and begetting on their bodies children who are affiliated to the infant husbands. When the infant husbands grow up, they find wives for the male children affiliated to them, and cohabit with those wives, and so the custom goes on.

Of the agricultural population of the Madras Province generally Doctor Cornish writes* as follows :—"The habits and customs of the cultivating castes, in regard to the worship of the Village deities, the polyandrous habits of some of the sub-castes, and the peculiar relations of the sexes in families, to say nothing of complexion and features, indicate a non-Aryan origin." Whether any *Ārya* blood still flows in the veins of those dark-skinned and simple folk it is very difficult to say : but it can

*Madras Census Report, 1874, p. 147.



hardly be rash to affirm that few if any of them can properly be styled Hindūs. Not only is polyandry in various forms far more common in South India than has been supposed, but practices which Hindūsīm abhors almost as greatly as polyandry are common in every part of that country. Thus, unless I am greatly mistaken, the marriage of widows and incestuous marriages are allowed in all but a very few castes, and in many castes men leave their wives, and women their husbands, to marry others. Doctor Cornish says* of the *Ideiyans* (Shepherds):—

“In some Districts the widows of this caste are married by the husbands’ brothers, and the sexual relations within the caste or sub-caste, are somewhat loose.” And of the weavers:—“Some of the weaving castes sanction widow re-marriage and concubinage of widows.” And of the *Oddars*:—

“They eat every description of animal food, and specially pork and field rats; and all drink spirituous liquors. A man marries as many wives as he can get..... Divorce is common and re-marriage of widows also.” And of the *Maravans*:—“In religion they are universally Sivaites, but practically demon-worshippers. Their widows re-marry. Divorce is easy and common. In their daily life they use flesh-meats and drink spirits.”

It would be tedious to go on giving extracts from Doctor Cornish’s observations upon the manners

* Madras Census Report, 1874.



and customs of the various tribes and castes that constitute the population of the Madras Province, and I will only add here that the general impression made on my mind by those observations is this, that Doctor Cornish, after consulting all the authorities within his reach, has come to the conclusion that the existing tribes and castes of the Madras Province, including the Brahmans, are at all events for the most part non-*Ārya*, being aboriginal or Skythian; that their customs, particularly in respect to the relations between the sexes, are very loose and immoral; that whatever religion may be professed by them outwardly or nominally, the great majority of natives are mere devil-worshippers; and that flesh-eating and indulgence in intoxicating drinks are everywhere most common. For myself, I cannot but believe that Doctor Cornish, partly perhaps from a laudable desire to think as little evil as possible, has understated the case against the so-called Hindū inhabitants of the Madras Province; and that in reality not nearly so many of them lives respectable from a Hindū point of view as that writer appears to suppose.

I observe that in attempting to classify the tribes and castes Doctor Cornish has taken the *Vellālans* to be the representatives of the "agricultural castes," and included the *Maravans Kallans* and others amongst the "agricultural labouring castes." And I gather from this and from the writers observations



generally that he has been led to believe that next to the Brahmans the *Vellālans* are the highest caste, whilst the *Maravans* and *Kallans* are quite inferior castes. At one time I used to believe the same things myself, but I have come to see good grounds for questioning the truth of both the propositions. My inquiries in the Madura District inclined me to think that the *Vellālans*, *Maravans*, *Ahambadiyans* and *Kallans* together formed a group of closely connected castes, and that the *Vellālans* were at the best only slightly superior to the other three castes. And subsequent experience has caused me to doubt whether the supposed pre-eminence of the *Vellālans* rests upon anything more solid than a flattering recognition of their merits by the Brahmans.

It was with reference to "these *Maravans*" that Holloway, J., once remarked, see p. 29 above, on the "grotesque absurdity of applying the doctrine of Hindū-law" to a non-Brahman caste, and I imagine that that eminent Judge was advised, when he made the remark, that "these *Maravans*" were a very low caste indeed, having very little in common with Brahmans and certain high castes supposed to exist in the Madras Province. But as a matter of fact the *Maravans* are no worse than their neighbours. And if we want to find 'high castes' in the Madras Province, we must go about with a lantern at noon to do it. No doubt the Madras Province may boast a few families of *Mudalis*,



Chettis, *Vellāḷans* and others who, from a Hindū point of view, keep themselves above the general level of morality, and by a somewhat nice attention to the observance of caste rules and to the performance of religious duty have gained for themselves in the course of time the reputation of being good Hindūs and high-caste families; but the good conduct of a few families will not suffice to lift up out of the general mass the castes to which they may severally belong, and so far as I can see there is no good reason for averring that any particular caste of men in the Madras Province is a '*high caste*', though there are excellent reasons for holding certain castes to be lower than others.

A very superficial examination of Doctor Cornish's Census Returns for the Madura District will, I think, make it appear quite clearly that if it is "grotesquely absurd" on the part of the High Court of Judicature at Madras to apply the Hindū law to "*these Maravans*", who are to be found principally in the Madura District, also it is grotesquely absurd to apply that law to the so-called Hindū inhabitants of the Madura District generally, the Brahmans always being excepted. And, as I have remarked above, the Madura District is a fair specimen of a division of the Madras Province.

According to Doctor Cornish's Returns the Hindūs of that District in the year 1871 numbered



2,133,216, being classified in the following manner namely:—

1. Brahmans (Priests)	39,073
2. Kshatriyas (Warriors) ...	5,031
3. Chetties (Traders) ...	66,496
4. Vellālar (Cultivators) ...	497,839
5. Idaiyars (Shepherds) ...	145,506
6. Kammālan (Artisans) ...	73,253
7. Kanakkan (Writers) ...	1,144
8. Kaikalar (Weavers) ...	79,583
9. Vannian (Labourers) ...	611,762
10. Kusavan (Potters) ...	26,242
11. Sātāni (Mixed caste) ...	36,496
12. Sembadavan (Fishermen) ...	127,583
13. Shānān (Toddy drawers) ...	76,915
14. Ambatan (Barbers) ...	25,791
15. Vannān (Washerman) ...	28,381
16. Others ...	74,827
17. Pariahs ...	217,294

Total... 2,133,216

It will be observed that this classification for convenience' sake follows the old-fashioned arrangement in four classes and outcastes, the *Chetties* standing for *Vaisyas*, Nos. 4 to 16 for *Chūdras* and the Pariahs for out-castes. It is clear, however, that Doctor Cornish does not believe very strongly in the existence in the Madras Province of *Kshatriyas* and *Vaisyas*: and practically we may ignore them altogether, taking the 'warriors' and 'traders' to be



ordinary castes, neither better nor worse from a Hindū point of view than the majority of castes that follow reputable modes of life.

With regard to the '*Vellālans*' who head the list of *Qūdras*, it appears that the name is used by Doctor Cornish as a generic name to denote all the respectable castes that live principally by agriculture, and may be supposed to be more or less on a level with the *Vellāla* caste. From this aggregate the *Maravans*, *Kallans* and *Ahambadiyans* are for no intelligible reason excluded, as being not farmers but mere agricultural labourers, like the *Vannia* caste. As I have said before, I think the *Maravans* and the other two cognate castes must be classified with the *Vellāla* caste, which has no good claims to preeminence, and if those three castes are to be classified with the *Vellāla*, there would seem to be no good reason for not also classifying the majority of the "*agricultural labouring castes*" with the "*cultivators*".

Touching the "*agricultural labouring*" castes the Census Committee* remarked as follows:—"There can be no doubt that in all its branches this caste is non-Aryan. Speaking generally, this great caste may be considered as subordinate to the Vellalars, or proprietary cultivating class. It must not, however, be supposed that the many branches of this class have a common origin, any further than that

* Madras Census Report, 1874.



they are Dravidian and not Aryan. They represent a number of tribes which, in their former division and labor, resembled what the Nilgiri tribes are now. Practically they belong to the one class of labourers, and are named after the best known class *Vunnias* or *Pullies*. Many of the most extensive divisions are only local."

These remarks no doubt are true in the main. It must be remembered, however, that during the *Nāyakka* domination over the Madura country and the parts subject thereto the *Vellālans* were by no means the leading caste in the extreme South of India. Until perhaps the latter half of the last century the Telugus were all powerful in that part of the country, so long as the Government was able to keep order: whilst in times of war and anarchy the *Kallans* would rise in numerous bodies, overrun the country and levy black mail in every direction. Then the *Maravans* were warriors, holding lands by a feudal tenure, until the British Government thought fit to seize their country and split it up into a couple of new-fashioned *Zamīndāris* towards the close of the last century. For many generations and until the British power became paramount in the South of India, the *Vellālans*, I believe, were an obscure caste, one in no way conspicuous amongst a score of other castes that were earning a living by tilling the lands of the Rajahs and nobles of the country. But they were remarkable for peacefulness, industry, patience and moderation, and a long peace would seem to have



brought them their opportunity; they became rich, comparatively, and with riches they have contrived to get a name for piety and faithfulness towards the Brahmans. And hence their present position.

If the *Vellāḷans* proper are to be considered real Hindūs, a concession I am by no means prepared to make, their numbers are too insignificant to affect in a high degree the general question of the propriety of applying the Hindū law to the non-Muhammedan tribes and castes of the Madura District. The non-*Arya*, flesh-eating, spirit-drinking, devil-worshipping, "*agricultural labouring castes*" number no less than 611,762. If we add to these the Pariahs, who certainly are not better Hindūs than the *Vannias*, though I object to calling them alone '*out-castes*', and if we also add the Fishermen who, as purveyors of forbidden food, must necessarily from a Hindū point of view be considered to be sinners of the worst kind and quite beyond the pale, and the Toddy-drawers and '*others*', we shall at once make up an aggregate of non-Hindūs exceeding half the entire population of the Madura District.

Then, if we exclude from the body of possible Hindūs the artisans who decline to submit to the Brahmans, the hard-drinking weavers, the "*mixed-castes*" who practically have repudiated the caste system and forsworn Hindūism, the barbers and the washermen, we shall have but a small portion of the population left, consisting of the *Cheṭṭis* or Traders,



the Shepherds, the Writers and the Potters. Some *Chetti* families, as I have observed before, may be really Hindū in the sense of consistent followers of the Hindū religion, but the great bulk of the caste are not to be preferred to the agricultural castes. And certainly the same may be said of the Shepherds and Others.

On the whole, therefore, it seems to be tolerably certain that the entire population of the Madura District, with the exception of less than 40,000 Brahmans and possibly a few *Chetti*, *Vellāla* and other families, not only is not *Ārya* but also is not 'Hindū', and therefore is not subject to Hindū law. And if this is true for the Madura District, I make no doubt it is true also for the Madras Province generally; whilst, judging from the contents of such books as the Abbe Dubois' work, I see good reason to suspect that it may be true for India generally.

If, then, the Hindū law ought not to be administered in any shape to the great bulk of the mixed population of the Madras Province, the question arises, what is to be administered instead of Hindū law? And the answer at once presents itself: The Madras Government has repeatedly promised, and is strictly obliged, to preserve unbroken the customs and usages of the various tribes and castes subject to its rule. Adequate efforts must be made to ascertain what are the customs and usages of the same: and



once ascertained, the High Court must be compelled by law to "*judicially recognize*" them. To force upon the Goldsmiths, the *Maravans* and scores of other castes the cold obstruction of the Brahmanic law, seems to me to be as unjust and immoral as it would be to oblige the entire population of the Madras Province to follow the English law of real property.

In Ceylon, I understand, the Dutch preserved the customs and usages of the people, and the English have followed their example of non-interference, and the result is that at the present day, although perhaps half the population is Tamil, Hindū law is unknown in the island.



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